TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 691.

SEABOARD AIR LINE RAILWAY, PLAINTIFF IN ERROR,

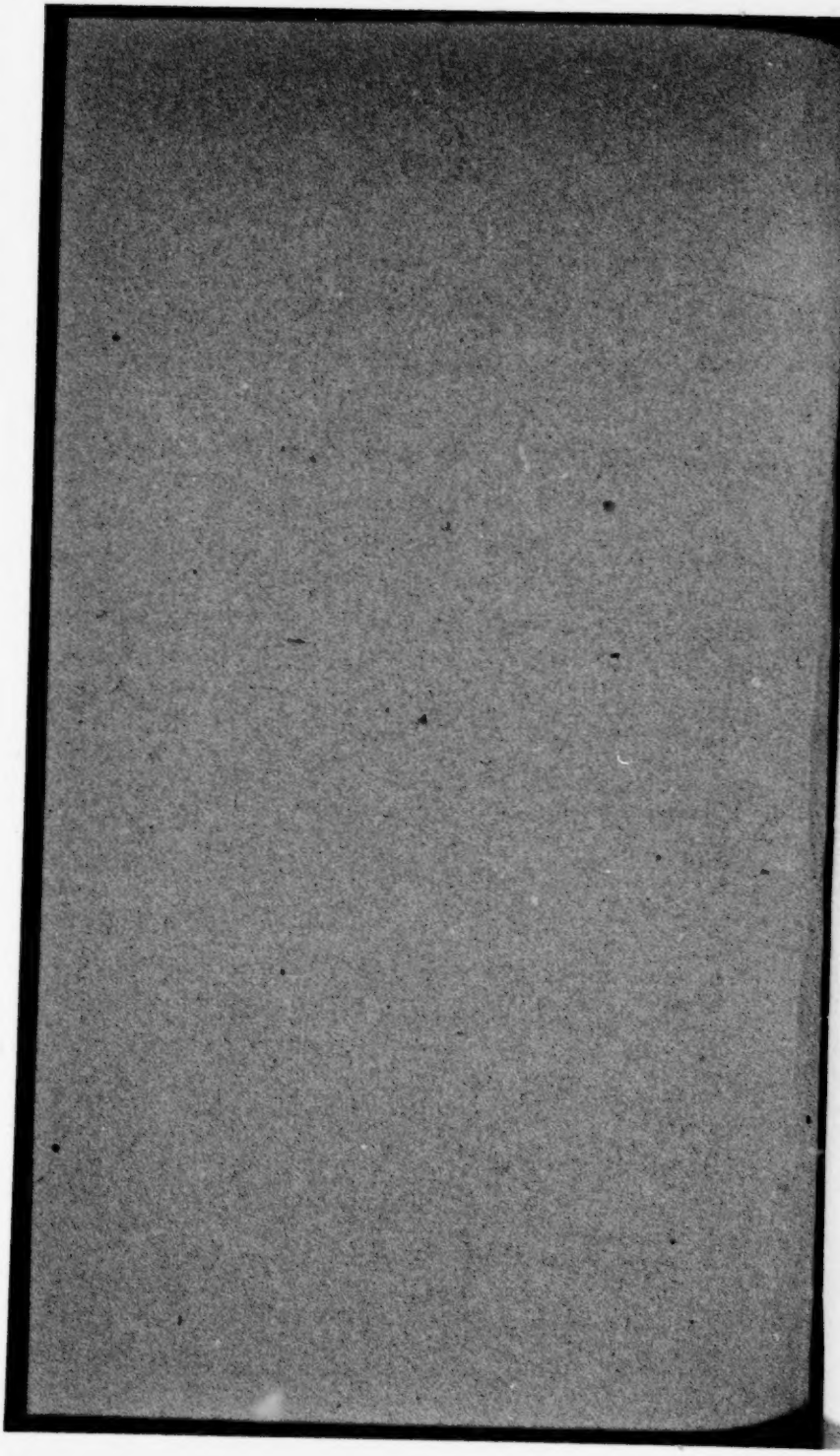
vs.

JAMES T. HORTON.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

FILED AUGUST 27, 1913.

(23,842)



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1 Sixth District.

No. —.

HORTON
against
S. A. L. RAILWAY.

(From Wake.)

Before G. S. Ferguson, J.

Defendant Appealed.

Caption.

Be it remembered, that at a Superior Court begun, continued and held in and for the county of Wake, State of North Carolina, at the courthouse in the city of Raleigh, on the seventh Monday after the first Monday of September, 1912, it being the 21st day of October, 1912, before Honorable G. S. Ferguson, Judge presiding, the following proceedings were had, to-wit:

Summons for Relief.

Wake County, in the Superior Court.

JAMES T. HORTON
against
SEABOARD AIR LINE RAILWAY.

The State of North Carolina to the Sheriff of Wake County, Greeting:

You are hereby commanded to summon Seaboard Air Line Railway, the defendant above named, if it be found within your county, to be and appear before the Judge of our Superior Court at a Court
2 to be held for the county of Wake, at the courthouse in Raleigh, N. C., on the seventh Monday after the first Monday of September, it being the 24th day of October, 1910, and answer the complaint, which will be deposited in the office of the Clerk of the Superior Court of said county within the first three days of said term; and let the said defendant take notice, that if it fail to answer the complaint within the time required by law, the plaintiff will apply to the Court for the relief demanded in the complaint.

Hereof fail not, and of this summons make due return.

Given under my hand and seal of said Court, this 5th day of October, 1910.

W. M. RUSS,
Clerk Superior Court.

Prosecution Bond.

We acknowledge ourselves bound unto the defendant in this action in the sum of $200; to be void, however, if the plaintiff shall pay to the defendant all such costs as the defendant may recover of the plaintiff in this action.

Witness our hands and seals, this 5th day of October, 1910.

J. T. HORTON. [SEAL.]
J. S. HORTON. [SEAL.]

Return of Summons.

Received October 6, 1910; served October 10, 1910, by reading the within summons and delivering a copy of the same to W. T. Huntley, agent at Raleigh, N. C., for Seaboard Air Line Railway, the defendant therein named.

J. H. SEARS,
Sheriff of Wake County,
By H. H. CROCKER, *D. S.*

And on the 9th day of November, 1910, the plaintiff James T. Horton, by his attorneys, Messrs. Douglass & Lyon and Holding, Snow & Bunn, comes and complains as follows:

3 *Complaint.*

NORTH CAROLINA,
Wake County:

In the Superior Court, January Term, 1910.

(Title of Cause.)

The plaintiff complaining of the defendant, alleges:

1. That on the 4th day of August, 1910, and some time prior thereto and ever since that time, the defendant was and now is a corporation duly chartered and organized and engaged in the operation of a line of railway from Hamlet, N. C., to Portsmouth, Va., via Raleigh, N. C., and other points north and south thereof, outside of the State of North Carolina.

2. That on the said 4th day of August, 1910, the plaintiff, who was then and now is a resident of the county of Wake, State of North Carolina, was a young man thirty-one years of age, with perfect eyes and eyesight and otherwise physically and mentally sound, was in the employ of the defendant as a locomotive engineer, and on said day and date was engaged in running and operating a locomotive engine of defendant and in the discharge of his duties as locomotive engineer aforesaid, drawing a train of loaded freight cars, a part of which said cars were loaded with goods, wares and merchandise

which the defendant had received for transportation and was transporting from points inside the State of North Carolina to Portsmouth, Va., and other points outside of North Carolina over its said line of railroad.

3. That it was the duty of the defendant to furnish to the plaintiff a locomotive engine for the use of the plaintiff in the discharge of his duties as locomotive engineer aforesaid that was properly equipped with modern safety appliances that were in general use, especially with a modern and safe water glass, such as was at that time in general use upon railroad steam locomotives, for the purpose of gauging the water in the steam boiler of the said locomotive and such as would protect the plaintiff from injury to his person
4 while in discharge of his duties as locomotive engineer aforesaid and that would afford him a safe place where he might discharge his said duties.

4. That in disregard of its aforesaid duty to the plaintiff on the day and date aforesaid, the defendant negligently furnished to the plaintiff a locomotive engine with which to draw the aforesaid cars loaded with goods, wares and merchandise as aforesaid, negligently and carelessly equipped with a water glass that was not modern in its make and that was unsafe for use and that was of an inferior grade and quality, and which water glass was known to the defendant to be not modern in its make and unsafe for use and of an inferior grade and quality and liable to burst and seriously and permanently injure the plaintiff while in the discharge of his duty as locomotive engineer aforesaid.

5. That while in the discharge of his duty as locomotive engineer as aforesaid, and while running and operating the locomotive engine which the defendant negligently furnished as aforesaid to the plaintiff on the day and date aforesaid, negligently and carelessly equipped with said defective glass not modern in its make and unsafe for use as aforesaid and which was of an inferior grade and quality as aforesaid, at a point on the line of the defendant's said railroad in the county of Wake, State of North Carolina, known as the town of Apex, the plaintiff, as it was his duty frequently to do, looked at the aforesaid water glass with which said engine was equipped with said defective glass not modern in its make and unwater that was in the boiler of said locomotive, and while he was so looking, said water glass on account of its being defective as aforesaid and of inferior grade and quality as aforesaid and not modern in its make as aforesaid was exploded and burst by the steam pressure from said boiler, and pieces of flying glass therefrom were violently thrown thereby into the face and right eye of the plaintiff, seriously, painfully and permanently wounding, cutting and
5 bruising his face and eyeball of the plaintiff's right eye and almost totally destroying the vision of the plaintiff's right eye, so that his trade, business and calling as a locomotive engineer has been destroyed by reason of said injuries and so that the plaintiff has been rendered totally unfit and unable to perform the duties of his said trade, business and calling and has lost his employment with the defendant on account thereof and is unable to obtain em-

ployment as a locomotive engineer with the defendant or any one else.

6. That on account of the aforesaid negligence of the defendant as hereinbefore set out, the plaintiff has been seriously, permanently and painfully injured and rendered totally and permanently unfit to perform the duties of his trade, business and calling, has suffered great physical pain and mental anguish, has lost much time from his business, has been sorely inconvenienced, has spent large sums of money for medical attention and medicines, and has been injured and damaged in the sum of fifty thousand dollars.

7. That at the time that plaintiff was injured as alleged in this complaint, the defendant was engaged in interstate commerce, and the plaintiff was employed and engaged in interstate commerce, and brings this action under the Federal Employer's Liability Act passed by the United States Congress and approved on the 22d day of April, 1908 and the amendments thereto.

Wherefore, the plaintiff prays judgment that he recover of the defendant fifty thousand dollars damages, together with the costs of this action, and for such other and further relief as he may be entitled to in the premises.

DOUGLASS & LYON,
HOLDING, SNOW & BUNN,
Attorneys for Plaintiff.

NORTH CAROLINA,
Wake County:

JAMES T. HORTON, the plaintiff above named, being duly sworn, deposes and says that the foregoing complaint is true to his
6 own knowledge, except as to matters stated on information and belief, and that as to those matters he believes it to be true.

JAMES T. HORTON.

Sworn to and subscribed before me, this the 9th day of November, 1910.

W. M. RUSS,
Clerk Superior Court.

And thereafter, to-wit, on the 6th day of December, 1910, the defendant, by its attorney, Murray Allen, Esq., comes and answers as follows, to-wit:

Answer.

NORTH CAROLINA,
Wake County:

In the Superior Court, October Term, 1910.

(Title of Cause.)

The defendant answering the complaint herein, says:

1. That allegations of section 1 are admitted.

2. The defendant denies, upon information and belief, that on August 4, 1910, the plaintiff was a young man with perfect eyes and eyesight and otherwise physically and mentally strong as alleged in section 2 of the complaint.

3. The defendant is informed, advised, and believes, that the allegations of section 3 of the complaint state matter of law, and the defendant is not called upon to make answer thereto; but the defendant says, in regard to the matters set forth in said section, that it has performed its duty to plaintiff in every respect as required by law.

4. The allegations of section 4 are not true, and are denied.

5. The allegations of section 5 are not true, and are denied.

6. The allegations of section 6 are not true, and are denied.

And for further defense, the defendant says:

1. That if the plaintiff was injured as alleged in the complaint, which the defendant expressly denies, the said injury was caused by the negligence of the plaintiff in the manner in which he
7 used the water glass, which he alleges was in a defective condition, and the manner in which he operated the engine on which he was employed, and his contributory negligence is pleaded by the defendant in bar of plaintiff's right to recover in this action.

2. That if the engine on which plaintiff was employed was defective in any respect on August 4, 1910, as alleged in the complaint, which the defendant again denies, such condition was known to the plaintiff, and he carelessly and negligently failed to report said condition to defendant's foreman as it was his duty to do, and his contributory negligence in that respect is pleaded by the defendant in bar of plaintiff's right to recover in this action.

3. That if the defendant was negligent as alleged in the complaint, which is again expressly denied, the plaintiff by his own negligence contributed to his injury, if any he has sustained, in that, having knowledge of the character and condition of the water glass on the engine upon which he was employed and knowing the risk incident to its use in that condition, he negligently and carelessly continued to use said water glass, and the defendant pleads plaintiff's contributory negligence in bar of his right to recover in this action.

4. The defendant again denying that the plaintiff sustained the injuries as alleged in the complaint, says that if the water glass on the engine on which he was employed was not modern in its make and was defective in any respect, both of which are denied, the character and condition of said water glass were open and obvious and were fully known to the plaintiff and he continued to use said water glass with such knowledge and without objection, and he knew and voluntarily assumed the risk incident thereto, and the defendant pleads such voluntary assumption of risk in bar of plaintiff's right to recover in this action.

Wherefore, the defendant demands judgment that it go without day and recover the costs of this action to be taxed by the Clerk.

MURRAY ALLEN,
Defendant's Attorney.

8 J. F. MITCHELL, being duly sworn, says that he is agent for the defendant company at Raleigh, N. C.; that the foregoing answer is true to his own knowledge, except as to matters therein stated on information and belief, and that as to those matters he believes it to be true.

J. F. MITCHELL.

Sworn to and subscribed before me, this 6th day of December, 1910.

[N. P. seal.] CARY K. DURFEY,
Notary Public.

Commission expires September 19, 1912.

And thereafter, to-wit, on the 20th day of April, 1911, the defendant, by its attorneys, Messrs. Armistead Jones & Son, and Murray Allen, comes and files an amended answer, as follows:

Amended Answer.

NORTH CAROLINA,
Wake County:

In the Superior Court, October Term, 1910.

(Title of Cause.)

The defendant answering the complaint herein, says:

1. The allegations of section 1 are admitted.

2. The defendant denies, upon information and belief, that on August 4, 1910, the plaintiff was a young man with perfect eyes and eyesight as alleged in section 2 of the complaint. At the time alleged in the complaint, the plaintiff was engaged as engineer in the operation of an engine drawing a train between Aberdeen, N. C., and Raleigh, N. C., and his duties were performed entirely in the State of North Carolina.

3. The defendant is informed, advised, and believes, that the allegations of section 3 of the complaint state matter of law and the defendant is not called upon to make answer thereto; but the
9 defendant says, in regard to the matters set forth in said section, that it has performed its duty to plaintiff in every respect as required by law.

4. The allegation- of section 4 are not true, and are denied.

5. The allegations of section 5 are not true, and are denied.

6. The allegations of section 6 are not true, and are denied.

7. The defendant has no knowledge or information sufficient to form a belief as to the truth of the allegations of section 7 of the complaint, and therefore demands strict proof thereof.

And for further defense, defendant says:

1. That if the plaintiff was injured as alleged in the complaint, which the defendant expressly denies, the said injury was caused by the negligence of the plaintiff in the manner in which he used

the water glass, which he alleges was in a defective condition, and in the manner in which he operated the engine on which he was employed, and his contributory negligence is pleaded by the defendant in bar of plaintiff's right to recover in this action.

2. That if the engine on which the plaintiff was employed was defective in any respect on August 4, 1910, as alleged in the complaint, which defendant again denies, such condition was known to the plaintiff, and he carelessly and negligently failed to report said condition to defendant's foreman as it was his duty to do, and his contributory negligence in that respect is pleaded by the defendant in bar of the plaintiff's right to recover in this action.

3. That if the plaintiff was injured as alleged in the complaint, which the defendant again expressly denies, the plaintiff by his own negligence contributed to his injury, if any he has sustained, in that, having knowledge of the character and condition of the water glass on the engine upon which he was employed, and knowing the risk incident to its use in that condition, he negligently and carelessly continued to use said water glass, and the defendant pleads plaintiff's contributory negligence in bar of his right to recover in this action.

4. The defendant again denying that the plaintiff sustained the injuries as alleged in the complaint, says that if the plaintiff was injured by the explosion of the water gauge on the engine on which he was employed, which is denied, the said injury was caused by his own negligence in using the said water gauge when he could have operated said engine by using the gauge cocks thereon, and his contributory negligence is pleaded by the defendant in bar of plaintiff's right to recover in this action.

5. The defendant again denying that the plaintiff sustained the injuries as alleged in the complaint, says that if the water glass on the engine on which he was employed was not modern in its make and was defective in any respect (both of which are denied), the character and condition of the said water glass were open and obvious and were fully known to the plaintiff, and he continued to use said water glass with such knowledge and without objection, and he knew and voluntarily assumed the risk incident thereto, and the defendant pleads such voluntary assumption of risk in bar of plaintiff's right to recover in this action.

6. The defendant again denying that the plaintiff sustained the injuries as alleged in the complaint, says that if the water glass on the engine on which plaintiff was employed was not modern in its make and was defective in any respect (both of which are denied), it was the plaintiff's duty, and he had every opportunity, to know the condition thereof, and the risk incident thereto, if any, was assumed by the plaintiff, and his said assumption of risk is pleaded by the defendant in bar of the plaintiff's right to recover in this action.

7. That if the plaintiff was injured as alleged in the complaint, which is denied, there was open to him two ways of operating the engine on which he was employed: by using the water glass and by

using the gauge cocks, which was a safe way to operate said engine; and in voluntarily operating the said engine with the water glass as alleged in the complaint, the plaintiff assumed the risk of injury therefrom, and his assumption of risk is pleaded by the defendant in bar of plaintiff's right to recover in this action.

11 Wherefore, the defendant demands judgment that it go without day and recover the costs of this action to be taxed by the Clerk.

ARMISTEAD JONES & SON,
MURRAY ALLEN,
Defendant's Attorneys.

J. F. Mitchell, being duly sworn, says that he is agent for the defendant company at Raleigh, N. C.; that the foregoing answer is true of his own knowledge, except as to matters therein stated on information and belief, and as to those matters he believes it to be true.

J. F. MITCHELL.

Sworn to and subscribed before me, this 15th day of April, 1911.
C. T. McDONALD,
Notary Public.

My commission expires 1st day of February, 1912.

This cause came on for trial at April Term, 1911, of the Superior Court of Wake County, and at the conclusion of the plaintiff's evidence, his Honor Judge H. W. Whedbee sustained defendant's motion for judgment of nonsuit and dismissed the action. Plaintiff appealed to Supreme Court, and at Fall Term, 1911, of the Supreme Court of North Carolina the judgment of the Superior Court was reversed and a new trial ordered.

Amendment to Complaint.

This cause being called for trial at October Term, 1912, of Wake Superior Court, plaintiff moved to amend his complaint as follows, which motion was allowed and the complaint so amended:

Amendment to Complaint.

NORTH CAROLINA,
Wake County:

In the Superior Court, October Term, 1912.

(Title of Cause.)

The plaintiff amends his complaint filed herein as follows, by inserting in paragraph four thereof, the following:

12 That the said water glass was imperfect, defective, dangerous and unsafe in the following particulars, which were also

known to the defendant, and by it negligently allowed to continue and exist, to-wit: in that the same had no guard glass or shield in front thereof and in connection therewith.

DOUGLASS, LYON & DOUGLASS,
W. B. SNOW,
J. W. BUNN,
R. N. SIMMS,
Plaintiff's Attorneys.

NORTH CAROLINA,
Wake County:

James T. Horton, the plaintiff, being duly sworn, deposes and says that he has read the foregoing amendment; that the same is true of his own knowledge, except as to matters therein stated on information and belief, and as to those he believes it to be true.

JAMES T. HORTON.

Sworn to and subscribed before me, this 21st day of October, 1912.

VITRUVIUS ROYSTER,
Deputy Clerk.

Answer to Amendment to Complaint.

The defendant filed the following answer to the amendment to plaintiff's complaint:

Answering said amendment to the complaint, defendant says: The allegations of said amendment are not true and are denied. Verification of this answer is waived by plaintiff.

Trial, Jury, Etc.

Therefore let a jury come by whom, etc.

And thereupon this action coming on for trial, the following jurors, to-wit: M. A. Thomas, J. E. Strickland, C. L. Ferguson, S. T. Underhill, William Keith, A. A. Adams, C. E. Ferrall,
13 J. W. Booth, B. F. Tucker, Willie Jones and L. M. Knott, are chosen, tried and sworn and empaneled to try the issues joined between the parties.

And thereupon after the introduction of evidence on behalf of the plaintiff and defendant, and after the charge of the Court, said jurors heretofore empaneled in this case, for their verdict found the issues submitted to them as follows:

Issues—Verdict.

1. Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint?

Answer. Yes.

2. If so, did the plaintiff assume the risk of injury, as alleged in the answer?

Answer. No.

3. Did the plaintiff by his own negligence contribute to his injury as alleged in the answer?

Answer. Yes.

4. What damage, if any, is the plaintiff entitled to recover?

Answer. $7,500.00.

Motion to Set Verdict Aside, Etc.

Motion by defendant for judgment non obstanti veredicto.

Motion overruled and defendant excepts.

Motion by defendant to set aside verdict and for new trial for errors alleged to have occurred during the trial. Motion overruled and defendant excepts.

And thereupon judgment is rendered by the Court and entered and filed in this action in the following words:

Judgment.

This cause coming on to be tried before his Honor, G. S. Ferguson, Judge, and a jury, and being tried, the following issues were submitted to the jury:

14 1. Was the plaintiff injured by the negligence of the defendant as alleged in the complaint?

2. If so, did the plaintiff assume the risk of injury, as alleged in the answer?

3. Did the plaintiff by his own negligence contribute to his injury as alleged in the answer?

4. What damage, if any, is the plaintiff entitled to recover?

And the jury having answered the first issue "Yes," the second issue "No," the third issue "Yes," and the fourth issue "$7,500.00," and it appearing to the Court that this action was brought and tried under the Federal Employers' Liability Act of 1908, it is therefore ordered, adjudged and decreed that the plaintiff, James T. Horton, recover of the defendant, Seaboard Air Line Railway, the sum of seven thousand five hundred dollars ($7,500.00) and the cost of this action to be taxed by the Clerk.

G. S. FERGUSON,
Judge Presiding.

To the foregoing judgment defendant again excepts, and in open court appeals to the Supreme Court. Notice of appeal given in open court and further notice waived. Undertaking on appeal fixed in the sum of fifty dollars. By consent defendant allowed thirty days to file and serve statement of case on appeal and the plaintiff allowed thirty days thereafter to serve counter statement or exceptions.

The defendant thereupon filed the following appeal bond:

Appeal Bond.

NORTH CAROLINA,
Wake County:

In the Superior Court.

(Title of Cause.)

Whereas, at October Term, 1912, of the Superior Court, of
15 Wake County, the plaintiff recovered judgment against the defendant for the sum of seven thousand five hundred dollars and the cost of this action; and

Whereas, the defendant intends to appeal from said judgment to the Supreme Court.

Now, therefore, we, Seaboard Air Line Railway and the National Surety Company of New York, undertake pursuant to the statute in the sum of fifty dollars, to pay all costs which may be awarded against said defendant on said appeal.

NATIONAL SURETY CO. OF N. Y., [SEAL.]
By MURRAY ALLEN, *Attorney.*
SEABOARD AIR LINE RAILWAY, [SEAL.]
By MURRAY ALLEN, *Attorney-in-Fact.*

Defendant's Statement of Case on Appeal.

NORTH CAROLINA,
Wake County:

Superior Court, October Term, 1912.

(Title of Cause.)

This was a civil action for damages, brought by the plaintiff under the Federal Employer's Liability Act, passed by Congress of the United States, to recover for personal injuries alleged to have been sustained by plaintiff while employed by the defendant. The action was tried at October Term, 1912, of Wake County Superior Court, before his Honor, G. S. Ferguson, Judge, and a jury. The pleadings which appear in the record show the contentions of the parties. The issues, with the answers thereto made by the jury, appear in the record.

Plaintiff offered evidence as follows:

JAMES T. HORTON, plaintiff, being duly sworn, says:

On August 4, 1910, I was employed by the defendant as locomotive engineer, running a local freight train from Aberdeen,
16 N. C., to Raleigh, N. C., using engine 752. August 4th was third trip I had this engine. It was placed in my charge July 27th. My schedule was, leave Raleigh 7:30 A. M.; due at Aberdeen at 4:45; generally got in between 9 and 10. Would leave Aber-

deen at 6:35 next morning. On the day of my injury I left Aberdeen at this time. My engine was equipped with Buckner water gauge, with guard glass gone. I was injured between 1 and 1:30 o'clock on August 4th. My train had cars of freight destined to points in Virginia and Pennsylvania. (A Buckner water glass is handed to plaintiff for examination.) This water gauge sits at a point on the boiler head to the left of the engineer. On the inside of the brass case of the water gauge is a small thin glass tube. The entire pressure of steam into the boiler passes into the glass tube. The guard glass is placed in the opening in the brass case to protect the engineer from flying glass if the glass tube should burst. The guard glass is three-eighths to five-eighths of an inch thick. (Plaintiff's counsel produces a small rule and witness measures thickness of glass.) It lacks a fraction of measuring half inch. The gauge glass is used to tell the water level in the boiler, how much or how little water you have in the boiler. You can see through the guard glass and see the water in the round glass tube. The guard glass was missing when I took the engine. I ascertained that the guard glass was gone when I got on the engine to pull it out on the first trip. I was due to leave here at 7:30 on the 27th or 28th of July, and we have thirty minutes from the time we are called to report to the round-house and register and check the train sheet and see if we have sand and water and plenty of coal. We head out from the round-house track and back out where the local freight is made up. When I have done that, the conductor comes up with his order, and it was time to go. I read the order, handed it to my fireman and pulled out. When I pulled out on the first trip that I had on this engine I noticed that the guard glass was gone. I ran it that trip and came back again. I ran the engine to the coal chute track or track
17 opposite the turntable, and told Mr. Matthews, the day round-house foreman at Johnson Street—he is here now—there he sits—I told him this guard glass was gone, and asked him if he had one. He said they did not keep them in stock here, that they were made in Portsmouth, and he would have to send to Portsmouth to get one—to run her like she was. He said he would send to Portsmouth and get me one.

The defendant objects in apt time to the conversation with Matthews and to any statement made by Matthews to the plaintiff, and asks that the evidence be stricken out. Objection overruled, and defendant excepts.

Exception No. 1.

I ran the engine next morning without a guard glass, and brought it in again next night. I don't remember whether I did or not. I know I had two round trips—that would be four days—but I don't remember whether I had it three or not, it has been so long. After Mr. Matthews told me he didn't have any, I went to the Baker-Thompson Lumber Company.

To the statement that "after Mr. Matthews told me he didn't have any, I went to the Baker-Thompson Lumber Company," defendant excepts and asks that it be stricken out. Objection overruled. Defendant excepts.

Exception No. 2.

I went to Mr. Charlie Murray, the glass cutter for the Baker-Thompson Lumber Company, and told him I wanted him to make me a guard glass and gave him the measurements.

Objection by defendant. Overruled. Defendant excepts.
Exception No. 3.
Q. Did you ever get the guard glass?
A. No, sir.

Objection by defendant to question and answer. Overruled. Defendant excepts.
Exception No. 4.

18 I carried the engine out August 3d. I left Johnson Street at 7:30 A. M. and arrived in Aberdeen somewhere between 8 and 9 o'clock. I spent the night there and left August 4th at 6:35 on my return trip to Raleigh. Arrived at Apex 1 to 1:30. I was due there at 1. I think I was a few minutes late. Stopped at train crossing there; carried off engine and three cars. The two rear cars were to stay at the other Apex track. I backed down to the depot and cut off engine from the three cars; had brakeman to carry me to the water tank; had to go back to the main line and head up to the water tank and get water. When I got back to the crossing, fireman said he was nearly perished to death. I said, "I am, too." I gave him a quarter and told him to step over to the store and get us something to eat, to keep us alive. We hadn't had anything since 6 o'clock. The brakeman and I backed back to the house track to couple cars. We didn't couple the cars; stopped about ten feet from the cars, and was backing up, with reverse lever between my legs, in this position (indicating). Just as I stopped the engine and went to raise up, just as I raised up to cross over, the water glass bursted and some of the flying glass hit me in the eye. I grabbed my handkerchief and put it over my eye. I felt my way to the steam valve, got the bottom valve and top valve off the best I could and crawled down on the fireman's side and opened the tank valve, which you would get water out of. I turned some of the water into my eye. My eye was burning like fire. Found my way to the depot platform; found the conductor. He asked me what was the matter. I told him the water glass had bursted and hit me in the eye; to get me to a doctor as quick as he could. He got on the engine. We left the cars; started to Raleigh; arrived at Cary in ten minutes, I suppose. There was a red board at Cary and the fireman stopped for the red board, and while he stopped I ran over to the drug store and asked the druggist to give me something to put in my eye. I went back to the engine. When an engine passes a red board, you had to get a clearance card. Then wired from Cary to have a doctor meet
19 me at Johnson Street with a carriage. I arrived at Johnson Street and got off the engine. The brakeman carried it on down to the turn pit. I got in a carriage; came to Dr. Lewis' office; he was out, but Dr. Rogers was phoning for him and got him word. He arrived about five minutes after I got in his office. I was sitting there. He came up to me and pulled my eye open, took an eye

dropper and dropped something in my eye; that kind of relieved me; waited five minutes and pulled it open and dropped some liquid in again—cocaine, I suppose—in about twenty minutes, and put me in his chair, lighted the gas, took the glass in his hand and put to his eye and looked at it. Dr. Lewis is the company's eye specialist. He and his partner, Dr. Battle, examined eyes for the Seaboard. Dr. Lewis treated my eye thirty or forty days. I suffered great pain in my eye and was worried about being out of a job. A piece of flying glass cut through very near the center of sight and left a scar there about the size of a horse hair. I can't read with that eye. I am not in a condition to run a locomotive engine.

Q. Have you applied for any job to run a locomotive engine?

A. No, sir; it's no use.

Defendant objects to the language, "it's no use," and asks the Court to strike it out. Objection overruled. Defendant excepts.

Exception No. 5.

I applied to Seaboard Air Line for a job and didn't get it. Before this injury my sight was all right. I was examined by Dr. Battle when I was promoted and passed a satisfactory examination. This was in March or April, 1905. At the time of my injury I averaged about $165 a month. I was out of employment 8 or 9 months after my injury. Since July 1911, I have had a job with the Wake Water Company reading and overhauling meters. At first I got $15 per week. Since last July I have gotten $70 a month.

Q. State if you have had mental suffering on account of your injury?

Objection by defendant. Overruled. Defendant excepts.

Exception No. 6.

A. Yes, I worry day and night because I cannot follow my chosen occupation. I can't make half the money I did make.

Defendant objects to the answer to this question and asks that it be stricken out.

Overruled and defendant excepts.

Exception No. 7.

It was the inner tube that exploded. The glass came from inside the brass case. I have paid Dr. Whitaker and Dr. Horton $5.00 a piece for examining my eye, and sixty or seventy-five cents for medicines. That is all I have spent for doctors and medicines. The Seaboard had two engine inspectors, one day and one night inspector.

Q. State what the duties of those inspectors were, if you know?

Objection by defendant. Overruled. Defendant excepts.

Exception No. 8.

A. It was their duty to inspect the engines from the ground up. They make out a report on each engine. That would include an inspection of the water glass.

Cross-examination:

I swore in my complaint that I had spent large sums of money for medical attention and medicines, at that time I had only
21 spent $5.65. When I took engine 752, on the morning of July 27th, I went to Aberdeen. I made three round trips with this engine. Each time when I came back to Raleigh I made out a work report. I placed them in a box at the round house provided for that purpose. I signed them. It is an engineer's duty when he gets on his engine to see that his engine is in good condition as far as he can before he takes it out. The engine is supposed to be delivered to him to make a successful trip. You can tell whether there is any water in the boiler by looking at the water glass and by the gauge cocks. It is the engineer's duty to see that his gauge cocks are in working order. He can do this by turning the gauge cocks. The engine is supposed to be delivered to the engineer with the gauge glass in working order. I had a copy of the book of rules. (A copy of the rules governing employees in force at the time is identified by plaintiff.)

Q. Read rule 668 to the jury.
Objection by plaintiff. Sustained. Defendant excepts.
Exception No. 9.

Q. Wasn't it your duty as an engineer to see that the engine was in good working order and furnished with the necessary tools, stores, and supplies, before going to work therewith, and if any defects were found to report it to the proper officer, and wasn't it your duty *an* engineman, in making a report at the end of a trip to state specifically in writing each and every defect?

A. We see as far as we have a chance to see, but they have got a tool checker to check the necessary tools, and they have got a hostler to put the coal and water on, and an engine inspector to inspect.

It is the engineer's duty to see that his engine is in good order before leaving, if he has time to do it. So far as he has time, he can't have a delay or he will get demerits.

After I got back from a trip it was my duty to make out reports and put them in a box at the round house. These reports were for work that I reported to be done on the engine. My duty
22 as an engineer required me to put on the work report such things as I thought necessary to be done on my engine.

(Defendant's counsel exhibits to plaintiff work reports marked exhibits A. B. C. and D., and plaintiff identifies the signatures on each one of his *signatures*.

I don't remember whether I said anything on these work reports about the guard glass being broken. When I made out my first report, the guard glass had been gone 2 days. When I made my next report it had been gone four days. When I came back from the trip on which I was hurt, I had had this engine five days without reporting this defect in writing, but I had reported it in person. I saw Mr. Matthews after the first trip at the coal chute. I was examined in the office of Mr. Bissett, master mechanic, about August

9th. The question- asked me and my answers were written out on the typewriter and I signed them (witness identifies his signature to paper. Exhibit F.) I am a member of the Brotherhood of Locomotives Engineers. The Brotherhood has rules and agreement under which engineers are employed. I was working under these rules and regulations (witness identifies book containing rule 49, marked exhibit E, as being a copy of contract and regulations under which he worked.

I had a copy of this contract—my contract of employment with the Seaboard provided that, as an engineer I would give my engine reasonable inspection, but would not be required to go underneath it. That was the agreement at the time I was hurt. I had the talk with Mr. Matthews sometime between 3 and 4 or 4 and 5 o'clock.

I told him that the shield or guard glass of engine 752 was gone and I wanted one. He said they had none in stock. He said to run her like she was, that he would send to Portsmouth and get me one. I don't remember anything else he said. He was standing out there and walked up and asked me how the engine was. I was
23 shaking the main rod and talking about hot boxes. If I didn't say anything at the other trial about Matthews telling me to run the engine I intended to.

Q. Haven't you added to your testimony this time that Matthews told you to go ahead?

A. No, I am stating to the best of my knowledge how it happened. I am following my other statement as closely as I can. Read what I said (counsel reads from printed record, as filed in Supreme Court on former appeal of evidence at former trial.)

Q. On your return to Raleigh what did you do?

A. I asked Mr. Matthews, the foreman if he had any glass, and he said "No," that they were put on in Portsmouth and he had none. He was day foreman at Johnson Street. I suppose that is all I testified to if it is put down that way. I intended to say the other. I have gone over my testimony taken on the former trial since that time. I have gone over it line by line, question and answer.

Q. Did you find anything in there about Matthews telling you to go ahead with the engine. State if you can find it anywhere in there?

Objection by plaintiff. Sustained. Defendant excepts. Exception No. 10.

Q. Do you remember finding anything in there about that?

A. I told you I don't remember everything I said in there.

Charlie Murray was a glass-cutter, employed by the Baker-Thompson Lumber Company. After the first trip when I found that Mr. Matthews did not have any guard glass, I went to see if Murray wouldn't make me one. I suppose that was between 4 and 5 in the afternoon. He could cut a guard out of a piece of glass. It is a comparatively simple matter to cut a piece of glass to go in that slot if you have glass of the proper thickness and know how to cut it. I didn't ask Mr. Matthews to cut me one. After I told him it was

gone he ought to have got me one. I didn't ask him to cut me one.

24 Q. It was a great deal easier to walk over to the Baker-Thompson Lumber Company and bother Mr. Murray than to ask Matthews for one?

A. He wasn't going to get me one.

Q. Why didn't you ask him?

A. I can't tell you why I don't ask a man anything. It just didn't occur to me. I reckon I didn't think of it. I can see no reason why you shouldn't cut this guard glass out of any piece of thick glass if you are a glass cutter. If I had gotten a piece of glass that size and shape, and had put it in that water gauge after the first trip, that would have been sufficient protection if the inside glass should explode. It would have protected me from flying glass. That is what it is for. A gauge cock is a steam valve on the boiler. They are right at the engineer and are 2 or 3 inches apart. When you turn the third gauge cock at the bottom and no water comes out, you had better get off the engine. When it goes below the second one that indicates that you have between one and two gauges of water. We have water in the tank and injectors right at hand to put water in the boiler from the tank. You can tell about how much water you have in the boiler with the gauge cocks, but you can tell better with the water glass. You can run the engine without a water glass. I have run it without one. If the water glass should break, it is the engineer's duty to shut it off and run in the shop and have one put in. Sometimes he has one and puts it in on the road. On the day I got hurt they brought the engine from Apex using the gauge cocks. The water glass had been cut out. You can cut it out by turning two valves. I went to Mr. Murray to get a guard glass because I wanted one put on the engine, so that in case the water glass should burst to keep flying glass from hitting me. I didn't want to operate the engine without the guard glass. I exerted every effort to get one and couldn't do it, and had it to do.

Q. The reason you were working so hard to get one was because it was dangerous and you thought it might explode and injure your eye?

25 A. I didn't know the water glass was dangerous, I knew there was some danger to it, but I was told by Mr. Matthews to go ahead and operate it without the glass, and if I hadn't I would have lost my job. I knew it was defective so far as the shield being gone. The shield is important as a protection to the engineer's eyes, that is all it is for. Nobody can tell when a water glass is going to burst. I knew the shield was gone and I knew it was put there for the safety of anybody on the engine. I had a water glass burst with me nine years ago, I reckon. Some steam got in my eye and irritated it (witness identifies release signed by him, marked Exhibit G.)

I started to say Mr. Baldwin came up to me in front of King-Crowell drug store.

Objection by defendant. Overruled. Defendant excepts.
Exception No. 11.

He was detective for the Seaboard, and said he was going to pay me for my time. I said I didn't want pay. He said he had been to see the doctor and he said there was nothing the matter with my eye, that it was just irritated; I lost 4 days, it amounted to eight or ten dollars, probably fifteen, and I signed it and in about 30 days they gave me a voucher for $8 or $10, certainly not over $15.

Defendant's counsel requests that the Court have the foregoing answer of plaintiff stricken from the record.
Objection overruled. Defendant excepts.
Exception No. 12.

An engineer that can stand an examination on one road can stand them on any road in the United States, they have practically the same rules and the same examinations.
Q. What effort have you made to get employment with any other road?
A. None, it is no use, just a waste of time and money to go and see about it.

26 Objection by defendant to the words "no use, just a waste of time and money to go and see about it," and defendant requests the Court to have them stricken out.
Objection overruled. Defendant excepts.
Exception No. 13.

I think I was examined by Dr. Battle in the Spring of 1905. Edgar Barbee was with me. I never had any injury to my eye when I was a child. I didn't tell Dr. Battle that I did. I never told Mr. Hopkins that I had a defective eye before this accident at Apex.

Dr. M. C. HORTON, admitted as being an expert, being duly sworn, testified:

I am an oculist, not related to plaintiff. I examined his eye on May 5th, of this year. I found a very small scar running across the cornea. The cornea is the portion of the eye that looks dark. It is a portion of the visual part of the eye. The scar runs at an axis of 120 degrees. I found his vision to be 20-70. We have a test card. We use letters that are gauged at a distance of 20 feet to represent a visual angle of 5 minutes. We gauge the biggest letter at 20 feet, which represents 20-100. That is an absolutely accurate test. The biggest letter represents 20-100. His sight is 20-70. 20-20 represents normal vision. It was his right eye. Vision was normal in his left eye. I don't think the injury to the cornea will ever clear up. The cornea has no power of regeneration. It has no blood vessels, and when deeper than the superficial layer, it is invariably permanent. There is no contraction of the tissues and no blood vessels to supply nourishment so that it never regenerates. This scar extended almost entirely across the visual part of the eye.

Cross-examination:

In making the tests with the cards, we have to depend to a certain extent on what the patient says. We don't take patient's word for it every time. If this injury occurred in 1910, and the scar had not cleared up any more, or if it has not cleared up permanently from that time, I would safely say it would never clear up. I found astigmatism in the eye. Astigmatism can be corrected with a lens. I have not treated Mr. Horton's eye. I made one examination and told him what I thought. Astigmatism is quite frequent.

Recross-examination:

There are dozens of causes of astigmatism, heredity, overstrain, injury, prolonged study with bad lights, etc. The plaintiff has been to see me only once as I recall. I made an examination of his eye. I knew nothing about the trial. I think he said he was going to have a trial. He paid me for my services in making the examination.

Q. What percentage of people have astigmatism?

A. I couldn't tell.

Q. A very large number?

Objection by plaintiff. Sustained. Defendant excepts. Exception No. 14.

I knew nothing as to the length of time the scar had been on his eye. I was not aware of anything having happened to his eye prior to that time. He claimed not to have had any injury to his eye when a child. I asked him his earliest recollection as to whether there had ever been a disease, and he said there had never been a disease there nor an injury. A permanent scar would interfere with the vision if located anywhere on the cornea, so far as the capacity is concerned it must be centrally located. I found upon examination that his sight could be improved very little with the use of glasses, it could be improved some. I made a note of the
28 fraction to which it could be increased. That was 20-40 minus, that is, he could see a couple of letters. 20-20 is normal. With one eye normal and the other 20-40, a man is not incapacitated to the extent of not being able to earn a living, but a man incapacitated to the extent of 20-40 one eye and 20-20 the other, with both eyes open will use the good eye exclusively. As to his ability to see, it varies entirely with the distance of the object, if his object is beyond 20 feet, if it is beyond 20-40 distance, he does not see it with his right eye. It would have to be a large object for him to see it beyond 20 feet. I don't think he requested me to prepare glasses for him, as I recall I made the examination, he paid me, and that was all.

Redirect again:

Injury is one of the causes of astigmatism. If, as I said, the eye could be improved 20-40 minus, he didn't see the whole line of

20-40, with 5 letters on the line, he sees 3; when I say 20-40 minus, that means that he only saw a small number, less than half.

Recross-examination:

In making the examination after I alternately cover and uncover the good eye, he doesn't know when I have covered it and when uncovered. If I found he was faking I would tell him to get out of the office quick. As a test against faking I always examine the good eye first. It is hardly possible for a man to fake under the ordinary methods of making an examination at the present day. We depend, to a certain extent, on what a man says.

Plaintiff rests.

Defendant moves for judgment of non-suit, and to dismiss the action. Overruled. Defendant excepts.

Exception No. 15.

29 The defendant offers the following testimony:

A. E. HOPKINS, witness for defendant, being sworn, testified:

I have been an engineer about 10 years. I am employed by Seaboard Air Line Ry. Been with them 6 years and 6 months. Prior to that I was with the Grand Trunk Railroad. I have run engine 752. I brought this engine into Raleigh 26th of July, 1910. It was equipped with a Buckner water glass. It was in good condition and had a guard glass in place. The engine also had water gauge cocks for determining the amount of water in boiler. They are at the right hand side of the boiler head, convenient to the engineer for opening and shutting to see how much water is in boiler. They are used to find out how much water is in boiler. They are sufficient for that purpose. The gauge cocks on the engine were all open and in good working order. It was nine o'clock in the morning when I came in with that engine on 26th of July. The gauge cocks are put on the boiler to ascertain the amount of water you have in the boiler, and, about trying them, if water comes out of the gauge you know you have that much water in the boiler, and if it doesn't you know you haven't got that much water in there. The duties of an engineer when going out on the road, are to inspect his engine, to know if it is in proper working order before going out. It is his duty, if it is not in proper working order to make a report to the round house and have any defects remedied and in the event anything should happen to the water glass to shut off the valves so no steam and water could get into the valves. He would run his engine by the water gauge and cocks. When engineers return from their trips, as part of their duties, they make a certain report of the defects of the engine on a form. They are required to make that report in writing. This report is put on file for the foreman to have work done that engineer reports. No attention is paid to verbal reports. The book handed me

30 by counsel is the contract of employment that was in force and effect at the time of this accident. (Contract of em-

ployment, rule 49 of the Seaboard Air Line Railway, rates, rules and regulations, identified as is offered in evidence by defendant. Marked exhibit E.)

I will read rule 49. "Engineers must give their engines reasonable inspection, but will not be required to go underneath them." The inspector inspects engines below the runni-g boards, he does not inspect in the cab. I had a conversation with him at the time Mr. Shot got his eyes injured. I met engineer Horton at Mr. Shot's house, when I left there he left with me, and we went over towards Johnson Street. On the way over, he told me that the sight of one of his eyes was affected, that he only had two or three-fifths sight with one eye. He said he was working here on the Seaboard, but he didn't suppose he would be able to get a job on another railroad on account of it. I can't tell the exact date of that conversation. It was in the neighborhood of two years I should say, before August 10, 1910.

Cross-examination:

I was on the way from Mr. Shot's house to Johnson Street, right at the old brick office on Halifax Street. That is on the way to Johnson Street. The brick office, I believe is at the corner of Peace and Halifax, I am not sure, because I am not well enough acquainted. I don't pay enough attention to the streets. Mr. Shot lived on Peace Street I believe, about, I think, the second block from Halifax, I think past Wilmington Street. I mean east of Wilmington Street. I went over to Mr. Shot's by myself and left there with Mr. Horton. I suppose I had been with Mr. Horton in the neighborhood of 45 minutes. I did not stay at Mr. Shot's house very long. Mr. Horton and I spoke about different men having their eyes injured, we spoke about engineer Henderlight having his eyes injured and we talked about Mr. Shot's eyes being hurt, that was the general part of the conversation I believe, having eyes injured. We talked about the circumstances that led up to Mr. Shot's eyes being injured. I told a couple of men about what Horton said, almost right away. They were Harry Cole and Frank Stockwell, an engineer. I knew it impaired an engineer's efficiency to hold a job if he had a defective eye. I don't particularly go around telling my friends faults and defects. I thought it queer that a man with a defective eye could run an engine. I was surprised at the company's not finding it out. I don't mean that I doubted it in my mind how a man could have 2-5 of an eye and run a locomotive engine. The railroad companies that I have worked for, in the examination, if a man hasn't a better eye sight than that, they do not let them run. If a man is smart enough to keep it from them it don't make no difference I don't reckon. It looked like it was easily done. Horton was doing it. It looked queer to me why he would be running an engine and not be found out by the company. I thought it was queer the railroad company hadn't found it out, because of the examinations we have to pass on eye sight. I had to pass them on the

Seaboard. I was examined that way. I suppose Mr. Horton was examined that way. We all had to be. I know it was a careful and searching examination with me. I thought it queer that a man could pass that examination and still have 2-5 of an eye. I don't remember the exact time I told about the conversation, I told them some time afterwards. Harry Cole lives next door to me, and I remember telling him some time, but I don't exactly remember when. They pay me $8 a day while I am here. I make that when I am running. They pay me $5.40 a hundred miles. Mr. Horton was a pretty fair engineer. I don't think he was above the average, he was an average engineer. The inspector inspects engines, but he don't look in the cab. The main part of the thing is not in the cab, the boiler is the main part of a locomotive, you don't get under the engine to see that. One part of an engine won't
32 work without another hardly at all. The cab is not only an important, but a vital part of an engine. Engineers are supposed to inspect engines above the running boards. Engineers are supposed to inspect in the cab, I don't know whether there is any particular rule about it, that has always been my understanding, that inspector is to inspect under the running boards. There is a rule between the company and the engineer, that the engineer is to give his engine a reasonable inspection. The running board that I speak of is about 5 or 6 feet from the ground side of the locomotive. The whole cab is above that. The sand box is about it. The whistle is above it, the smoke stack is above it, and about half of the boiler is above it. The engineer inspects, but he does not go underneath the engine, the other man goes underneath the engine and inspects that part. I never heard of his inspecting anything above the running boards. The engineer has to run the engine and inspect it above the running board, he has the best advantage to know, he sits right there all the time, he can see any defect there immediately. It is the engineer's business to keep his eye mostly in front, but he is allowed 15 minutes when he goes in to look over the engine and find out those defects. I don't know that it is the duty of the engine inspector to go and tap around about the door of the fire boxes and places like that. The inspectors and boiler makers have to knock the fire out of the boiler and look in there. They have hostlers for turning the engine out, getting it out of the round house and putting coal and sand and water on, he has to bring it out and sit it on the track. It is not altogether ready for the trip, the engine has got to be oiled. The hostler don't do any oiling. I don't know that he does everything else, that is all he has got to do, get it out and put coal, sand, and water on it. An engineer is supposed to be called an hour and fifteen minutes from his home. He is required to be on his engine before going out 30 minutes to inspect the engine and get ready to go out. The engineer is paid for that time. When he
33 comes in from his run, he stays on his engine fifteen minutes to look around the engine. He is paid for that time. We have to pay our expenses while at court.

Defendant offers in evidence Section 668 of rules and regulations for the government of the operating department.

Witness reads section 668 as follows:

"They must report for duty at the appointed times; see that the engine is in good working order and furnished with the necessary tools, stores, and supplies before going to work therewith. If any defects are found therein, report thereof must be made to the proper officer. Enginemen in making reports of the condition of engines at the end of trip, must state specifically in writing, each and every defect which requires attention. They will give checks for fuel and stores received, and assist in switching and making up trains when necessary." That was the rule in force at the time.

(Counsel hands witness a paper, exhibit A.)

That is the form of work report that was used. The engineer made out that form.

(Defendant offers in evidence exhibits A. B. C. and D., being work reports, identified by plaintiff as having been filled out and signed by him.)

Recross-examination:

I know Mr. Horton's signature. I would not swear that he signed these reports. These reports are pretty well filled up. They contain a good deal of work to be done. I don't think it would take a machinist a month to do the work on those reports. I didn't read every bit. There is a lot of work there, but it is only small jobs. If it says the main driving box is foundered and if they are cut off you take them in the shop. The length of time depends on how much force they put on to do the work. One man don't usually do that kind of work, it is too heavy. It would not take half an hour to do that work on report "B." It would take him a couple
34 of hours to do that work on exhibit "A." It looks like P. M. M. approved them, I expect that is Mr. P. M. Matthews, he was foreman of the round house, and that calls for the signature of the foreman of the round house. The work on this report would not take very long, a couple of hours, it calls for a great deal to be done, but they are small things. An engineer is paid by the company, 30 minutes before a trip, and 15 minutes afterwards. The last time I saw engine 752 before Mr. Horton took charge of it, was 9 o'clock the day before. I think I brought it in and turned it over at 9 o'clock one morning and he didn't get it until next day. I ran it 2 trips. Ernest Horton ran it one trip, but I don't remember just what run.

Redirect:

(Defendant's counsel hands witness yellow slip, being a work report, exhibit A.)

Witness reads the bottom note on work report. 'Enginemen must carefully inspect their engines after each trip and report their

condition on this form whether needing repairs or not. They will be held responsible for defects not reported. No attention will be given to verbal reports not signed by enginemen."

W. S. BENTON, witness for defendant, being sworn, testified:

Direct examination:

I am in the employ of the Seaboard Air Line as engineer, have been for nearly 2 years. Before that time I was fireman on the Seaboard. I was fireman on the engine at the time the plaintiffs claims he got hurt at Apex. I was on that run with him. I was fireman on the engine at first day he took it out. When we took charge of that engine on the morning of the 27th of July,
35 the water glass had the shield or guard in front of it on the morning we started on the first trip. The glass was dirty and smokey and you couldn't see through it. That was about 7:15. Nobody was on the engine but Horton and I. He had taken charge of the engine. I was fireman. The guard glass was smokey or dirty. We were in the yard, backing up to the train to take it out. I took the guard glass out to clean it. It was hot and I couldn't hold it, it burnt my hand. I laid it down over the fire-box and the jar, coupling the train knocked it off and broke it. Horton was running the engine when it was knocked off. I made the remark that the glass broke to Mr. Horton, and nothing else was said about it. He looked down at it. I suppose he saw it. This was the first morning that he had that run with that engine. We were going to Aberdeen. I was on the engine when Horton claimed he got hurt at Apex. When I got back he had a handkerchief around his eyes, he said it hurt him so that he could not run the engine, and I ran the engine on to Raleigh. I shut off the water gauge and gauged the water with the gauge cocks. They were in good condition. Mr. Horton made the remark that he was hungry and asked me to go over to the store and get him something to eat, and that is why I wasn't on the engine.

Cross-examination:

The glass was dirty and smokey and hot when it first came out of the round house that morning. I was on the engine when it was first discovered about 6:30 o'clock. I got on the engine before Mr. Horton. I took the glass out after I got out in the yard. When I took it out Horton was sitting on the seat backing the engine back to the train. He was looking back at the train where he was going. I took the glass out and laid it down on top of an oil can on the boiler head. It was about that high (indicating) and had a flat top. It was the shape of a kettle. The spout came
36 from the end of it, it was a square arrangement and held about a gallon, the top was about a foot long, and it was about that wide (indicating) something like 3 inches wide, the spout comes up from the end of it. That oil can was sitting just above the fire box door, what is called the drip pan, not a drip pan,

but a pan, about 3 feet from the floor I guess. It was pretty hot there. It burnt my hand, and I put it the first place I could get it, and the engine in rolling around rolled it around and broke it. When the engine coupled to the train it was this jar that knocked it off. Mr. Horton was still engaged in his duties as engineer when that happened. It is not a fact that Mr. Horton was not on that engine at the time we coupled it up and it is not a fact that I was not on that engine at the time it was coupled up, but was off somewhere getting breakfast. I didn't catch the engine as it was pulling out. I got breakfast that morning at Johnson Street about 6:30 when I first got down there, before the engine came out. I saw the glass fall. The glass had 200 pounds of steam pressure on it at the time and that heated the glass. It had been hot all night I guess. Those glasses will stay hot that way during a run, so hot that they burn your hands. It fell on the iron deck inside the cab, and broke all to pieces. It is half an i-ch thick I guess. It broke into pi*ce*s so it couldn't be used. I picked it up and threw it out. Horton was running his engine at the time. I got back to Raleigh about 3 o'clock I suppose, something like that. I didn't get a new glass. It wasn't my place. It is the engineer's place to put anything that is broken after the engine leaves the round house on the work report, and the people in the round house do the work on the engine. The firemen attends to all the lights. The fireman attends to firing the engine. I don't attend to replacing anything besides lanterns. They put it on the work report and the people in the round house do the work. If some of the tools are gone I get them. There is nothing else I get. If I had gone and asked for a water glass I suppose I could have gotten it, I didn't ask for it.

37 I went out with Mr. Horton on his next trip when he left here. The glass was situated in the cab on the left hand side. That is my side. We got back off that trip the next day. We left here again next morning on the same engine. We went to Aberdeen on the first day and came back to Raleigh. We went out to Aberdeen next day on the same engine and back to Raleigh, and the next day. The glass was gone every trip and I knew it, it was over on my side, I looked at it during the trips. You could see it from either side. I have to get up to see it. It is not my duty, *no*d I don't constantly look to see how much water there is in the boiler, and look at that glass to see how high the water is in the boiler when I am steaming the engine. Sometimes the fireman does not pay attention to the water, the engineer does. The fireman can if he wants to. When I wanted to I did it. Sometimes I would not look at it until every 3 or 4 hours. Mr. Horton seemed to be suffering pretty badly when I took the engine, he seemed to be in great pain. He had a handkerchief over his eyes and his hand over the handkerchief.

Q. How much do you get paid to come here and testify?

Objection by defendant. Overruled. Defendant excepts. Exception No. 16.

A. Eight dollars a day. I average about from $150 to $175 a

month wages. I was ordered through the superintendent of motive power to come here. No officer served any paper on me to come.

Redirect:

The Brotherhood of Engineers regulates how much pay I get for attending court as a witness in behalf of the railroad, the same Brotherhood that Horton spoke of as being a member of. All engineers get the same for attending court.

38 P. M. MATTHEWS, witness for defendant, being duly sworn, testified:

Direct examination:

I am a machinist on the Seaboard Air Line Ry. In 1910 I was round house foreman during the day. On the 4th of August, 1910, Mr. J. T. Horton did not report the absence of a guard glass from the Buckner water gauge on engine 752. I have no recollection of having a conversation with him. I did not tell Mr. Horton that these guard glasses were kept in Portsmouth and to go ahead and run his engine that I would send and get one. Forms are gotten out by the company for engineers to make out in writing defects in their engines. Verbal reports are not regarded. The reports are left at the round house office, and the roundhouse clerk distributes them. Each man takes his slip out of the box that is provided and makes repairs. The round house foreman has charge of the round house, he and the general foreman and the master mechanic look after repairs.

Q. If this defect had been reported on the work report by engineman Horton, the absence of the guard glass, what would you have done?

Objection by plaintiff. Sustained. Defendant excepts. Exception No. 17.

I had means at hand by which I could have remedied this defect if it had been reported in writing on the work reports of J. T. Horton. I would have remedied it by having a glass cut. I had a thick plate glass laid aside. I had the glass there out of which they could have made one of these guard glasses. I am familiar with the duties of an engineer in regard to inspecting his engine. He is not required to go under his engine, he is required to report every defect of that engine so that the work required can be done on it so that he can make a successful trip. The duties of an inspector are to inspect engines from the running board down underneath the engine.

39 Cross-examination:

If there is any trouble with the electric motor the engineer reports it. The air man oils the motor every trip, he or his helpers. Our electric man inspects the electric motors and head lights. The man that does this work is not an inspector. We have day inspectors and night inspectors. He inspects it from the running board

down. They can go in the cab when they see fit to send them in there for any special duties. Before this time Master Mechanic Bissett issued a bulletin, requiring an inspection of the old style water glasses at Raleigh. Inspectors were to inspect them. There was a special order issued for the inspector to do the job outside of his daily routine of duty. They gave it to the inspector. I had glass that could be used for guard glasses. I know that was a patent. I have put these glasses on. The glass is about a quarter of an inch thick. I was doing that on Buckner's patent. A bulletin had been issued for the inspection of the old style of glass with a wire screen before they used this. It was a pipe with splits in it, they used the gauge wire to protect them before they adopted this heavier glass, and the bulletin was to see that this was on it. All he had to do was to check each engine and find out. That bulletin went out of force after he checked his engines and went to the office, just as soon as he had checked the number of engines that ran in that terminal he was through. When the Seaboard road turned a water gauge over to a man it is under that man's charge until he returns with that engine from the trip and makes out his work report. As big a thing as a smoke stack I guess he would have seen that. He would have been a very foolish engineer to have started out without a steam gauge. It registers the steam pressure of a boiler. I didn't know whether that engine had a guard glass or not. There are two work reports on the 28th because it takes 2 sheets to hold it. I have seen them make as many as six. He made 2 sheets because he didn't have enough room on the first one.

On this one the trouble is engine brakes don't hold. Con-
40 nect up tank, put brake shoes on. Examine flat places on D. wheels. Both main wedges set up. That is all that was signed for. I had a conversation with Charlie Murray after the last trial, the man that Horton testified he went to to get the glass cut, he said yes he had cut several for the men. I don't know why they went over there. I have cut them for the company myself—had them cut. I have no recollection of telling Murray that he had better stick to the company as he was working for them. I have never said a thing to Murray about sticking to the company. I positively deny it. I want to tell the truth. I talked to all the engineers and they frequently told me about defects and troubles about engines. I go down to the coal chute frequently and talk to them and they come to me very often and talk to me. Horton never asked me for a guard glass. I have no recollection whatever of a conversation about it with him.

Redirect:

(Counsel hands witness glass ¼ inch thick, two pieces of which would fit the Buckner gauge.)

That is the kind of glass we used. The work entered on the back of the work reports does not necessarily represent all the work that was done on that engine at the time. Each man takes his proportionate work out and does it. If an engineer asked for a defect

to be repaired and asked for it on his work report, and that engine is returned to him without those things being repaired he could refuse to go out on that engine if it is detrimental to the company's service and would be injurious to him. He makes his report to the roundhouse foreman, the general foreman or the master mechanic, either that he gets to first.

Recross-examination:

If they tell him to take the engine anyway, and he refuses to do it, that is a case for the company to handle between employer and employee.

41 The COURT: So it is the duty of the engineer before he takes that engine to run it out to see that all the defects which he has reported have been properly remedied?

A. Yes, he can glance over his engine and see. A good man can tell by glancing over it whether the work has been done or not; that is the rule of the company.

Mr. DOUGLASS: How long would it have taken an engineer to have found out that those things had been performed? (Counsel hands witness a slip of paper.)

(A. The greatest portion of this he could walk around his engine and see. He ought to be able to tell that in 15 or 20 minutes. The rule gives him 30 minutes before leaving time to get ready to go. The inspector who inspected this engine 752 the 27th day of July made a report. I don't think I can get the report. He is supposed to make a report on that engine. If he didn't it is in the master mechanic's office. He keeps the reports in his office. The inspector makes a report, and they ought to be in Mr. Bissett's office. Mr. Brown was the day time inspector. I don't know where he is. I have seen him to-day. I guess he is outside. E. C. Boone was the night foreman. I don't know where he is.

Redirect:

It would take an engineer just long enough to step up on his engine to discover whether or not the guard glass had been placed in the engine. He could stand on the deck and tell.

Recross-examination:

If an engine inspector is looking for defects it would not take any longer than it would take the engineer to discover them.

J. E. BROWN, witness for defendant, being sworn, testified:

Direct examination:

I am employed by the Seaboard Air Line Railway. I was
42 employed by them in 1910—July and August. I was engine inspector. My duties as engine inspector at that time were to inspect engines from the running boards down and underneath the engine. It was my duty to inspect inside the cab.

Cross-examination:

If the engine came in on the 27th on my time I made a report. On that day I didn't make a report of defects above the running board. I have never made a report of defect on engine above the running board. The electric man looks after the electric lights. They had inspectors for electric lights. They had inspectors for every portion of the engine. The boiler makers inspected the boiler. He went in the fire box inside the cab and in the front end of the boiler. I inspected the machinery part of it. I did not go in the cab to see steam pipes. If I had seen one and heard it blowing loose in the cab I would have told the inspector of that portion of the engine so that he would have reported it himself. I would have made a verbal report. If the pipe or brake valve to the main reservoir was leaking in the cab I couldn't hear it. I couldn't hear it from the amount of noise; before I can get to it the engine is dead; there is no steam on it for me to determine. The engineer would report it when he came in. If the defect occurred after it stopped I couldn't have determined that. It would be when the engine had full steam on it that it happened, and the engineer couldn't help knowing it. It would not get in that fix just after he cut off steam. I haven't got anything to do with the pump. The air man or the one that looks after the steam apparatus will tell you that. I only look after the machinery part. They had a steam apparatus man. It was his duty to inspect the steam apparatus. On that *guage* part of the steam apparatus the steam goes into that.

43 Redirect:

It was the engineer's duty to inspect the inside of the cab. It was under his observation only. The steam man reports all the defects in steam, or if there is any steam leaking when the engine comes in. The engineer would report the absence of guard glass or anything like that—no one else. He would put it on his work report and put it in at the office. The machinist, the one that works on the engine, would do the work.

Recross-examination:

Mr. J. R. Bissett, master mechanic, did not paste a bulletin holding me and the night inspector responsible for water guage glasses on each locomotive that I know of. I never saw any bulletin to that effect.

D. K. WRIGHT, witness for defendant, being sworn, testified:

I am an engineer on the Seaboard. I have been an engineer 28 years. I have been with the Seaboard about 18½ years. I am chairman of the legislative board of the State for the Brotherhood of Locomotive Engineers. I am familiar with the equipment of engines on the Seaboard Air Line Railway in respect to gauge cocks and water glasses. I am familiar with the construction of engines of class 752. They are equipped with *guage* cocks and water glass. Gauge cocks are to determine the water level in the boiler. The gauge glass is

for the same purpose. You can operate an engine with the gauge cocks and the water glass cut off. You can do that safely. I have operated an engine that had no water glass on it. The *guage* glasses have been in use 10 or 12 years. Prior to that time we used only *guage* cocks. If anything should happen to the gauge glass it is the engineer's duty to shut the valves off and run the engine with
44 the gauge cocks. He can do that all right. It that happens while he is on the line of road it is his duty to shut off the water glass and use the *guage* cocks. When he gets to the terminal he should report defects on form provided for that purpose—a work report. It is the duty of an engineer when he gets on his engine to inspect the engine and see that it is in proper condition to make the trip; that it is supplied with the necessary tools, water, etc. If the engineer should discover while on the line of road that the water gauge has no guard glass it is his duty to shut the valves off and run his engine by the gauge cocks. That should be done to avoid accident, probability of glass bursting, and to afford protection to his eyes. In my opinion as an expert it is dangerous to use the Buckner water gauge without the guard glass.

The gauge cocks and *guage* glass are for the same purpose and perform the same functions on an engine. The gauge glass is a convenience and a check. We have two means for determining; this one is for convenience. They are both for the purpose of determining the amount of water in the boiler. I have only used the water glass twelve years. I don't know how long it has been in use. Ten or twelve years ago was the first time I used any on the Seaboard. The water glass attachment is not more accurate than the gauge cocks. You can't determine the height of water in the boiler above a certain point with more accuracy that with the gauge cocks. They are practically the same. The water glass is not as reliable as the gauge cocks. They are used as a convenience. I think that is for a check upon the other. If the gauge cock get clogged up with mud, clean them out, but it is rarely they get clogged up. Mr. Horton and myself are not personal friends.

It is the engineer's duty to report defects in the cab. He reports them on a form provided for that purpose in writing. It is the duty of an inspector in inspecting engines to inspect the parts under the running board.

45 Recross-examination:

On the 4th of August, 1910, and prior thereto the Seaboard at Raleigh did not have a special inspector whose duty it was to inspect this water glass in the cab that I know of. They didn't have a general inspector that inspected water glasses that I know of, or of steam apparatus. I don't know whether they had one at any time or not except the general inspector that inspects under the running board. I don't know whether they had any special inspector for that particular work.

DAVE CAMPBELL, witness for defendant, being sworn, testified:

Direct examination:

I am engineer on the Seaboard Air Line. Have been for seven years. I am familiar with the duties of engineers on the Seaboard Air Line. It is the duty of an engineer when he gets on his engine to see that his engine is properly equipped. When he comes back from his run it is his duty to inspect his engine and report what defects there are in writing. The engineer is required to make a visible inspection all over the outside and on the inside of the cab. The engineer is not required to inspect below the running board or to get under the engine. I am familiar with engines of class 752 on the Seaboard. It was equipped with water glass and water glass connection and gauge cocks. Gauge cocks are used to determine the amount of water in the boiler. If the guard glass on the water glass is missing it would be the engineer's duty to report it to the foreman and have it repaired. If he discovered that it was missing while on the road it would be his duty to shut off the water glass cocks and not use it. He could operate his engine all right without them. I have operated an engine that had no gauge glass on it many a time. It would be dangerous to operate a Buckner water glass without the guard glass. The tubes on the inside burst quite often. The
46 steam pressure on engines of that class is 200 pounds. Engines of that class are of the same character, and they have the same steam pressure.

Cross-examination:

I have been running engines here seven years. I have been running with these tubes ever since I first commenced. I couldn't say how many I ever had to break, probably on an average of one every six months. I am now using that style of water glass with a pipe I should assume half an inch in diameter, with a very small slot cut in it. It has a tendency to check it a little. A good many engines are run on the Seaboard now with that kind of glass.

(Counsel hands witness a water gauge which is not a Buckner gauge.)

I have not used one of these in nine years. That is not an absolute protection because that glass will break. Cold water hitting it when it is hot will break it. I used these glasses 9 years ago. That is a safer glass than the one I am using now. There was no inspector of steam connections at Hamlet as I know of. The roundhouse was there. I don't know the condition or equipment of engine 752 at that time. I don't know the condition the engine was in at all. I have used a Buckner water glass. Quite a number of engines are equipped with them. I couldn't state the numbers of them all. J. T. Horton was a good engineer.

Redirect examination:

The Buckner water gauge when the guard glass is in place is the best I have ever seen. With the guard glass out of place it is

dangerous. Whichever way it is elevated it will throw the force of the glass that way. When that slot is in proper place it is turned toward the engineer—right hand side of the engine.

47 E. B. BARBEE, witness for defendant, being sworn, testified:

Direct examination:

I am employed by the Seaboard Air Line, second division. I have operated engine 752 in the summer of 1910. It was equipped with a Buckner water gauge and had a guard glass. I was promoted from fireman to engineer about seven years ago. I was examined for promotion at the time that J. T. Horton was examined. I was examined in Mr. Bissett's office, Horton and I talked over the examination.

My sight was examined at the same time that Mr. Horton was examined. Dr. Battle examined me in his office on Wilmington street. I was present when Mr. Horton was examined. Dr. Battle did not ask me any questions. He did not ask Mr. Horton any questions. Dr. Battle told me his sight was defective in his right eye. He told Mr. Horton he would let him go to work, but he wasn't the Seaboard occulist; that he would have to come back and see Dr. Lewis. Horton admitted that it was in his childhood days that his eye was hurt.

Cross-examination:

I think it was about seven years ago we were examined. We were being examined for our eyesight and hearing, to show the railroad company it was normal, I suppose. I was going to run an engine. Horton was going to run an engine. We were promoted. We were standing that test to complete our promotion. I passed my test and was through with it, that is, I went before Dr. Battle first, then Mr. Horton. What I have said happened in the room at the time. I was still in the room after I was examined. We went there together, and I waited for Horton to get through. Horton was in the room when I was examined. We were both in the examination room at the same time. I passed my examination and Mr. Horton, as I told you, passed his examination. Dr. Battle promoted Mr. Horton with this proviso, that he wasn't the Seaboard occulist, but he would let him go to work, but he must come
48 back to see Dr. Lewis. Whether he want back to see Dr. Lewis I don't know. That was seven years ago, and he continued to run from that time to August, 1910. He was promoted and held the place as engineer. I saw the test that Mr. Horton was put through. Dr. Battle didn't ask us any questions. He had a certain number of figures fixed on a disc which was put up on the wall, and he would say, "What is that?" and I would say whatever it was. I don't know how many questions he asked us while we were in there. He would put this up on the wall and say, "What is that?" I don't know how many times he did that. I suppose it might have been eight or nine times. I think that is all. I have been examined another time for my eyes by the trainmaster on the

Seaboard, Mr. Thornton. He is our trainmaster on the second division. I don't think it was any more rigid. I was not with Mr. Horton any other time when we passed examinations of the eye. I suppose it is customary every certain number of years to examine engineers. I suppose they skip four years. I know Mr. Steele. He is an engineer on the Seaboard. George W. Steele is his name. I remember having a talk with him in the fall of 1910 at the same time I talked with him and Horton. I remember having a conversation by the Masonic Temple. I don't remember telling Mr. Steele in that conversation that I was examined at the same time Horton was, and that Dr. Battle didn't ask us any questions, and that Mr. Horton's eyes were as good as my eyes. I can tell what I do remember. I told Horton I was willing for him to summon me in this court, and that I would swear that Dr. Battle let him go to work, and that he didn't question him. When I say questioning as to his eyes, I didn't mean what was up on the wall, but as to his vision. I did not tell Mr. Steele in that conversation, or substantially tell him, that Mr. Horton's eyes proved to be as good as mine. I told him this: they let him go to work. Mr. Horton asked me for affidavits, and I would not give it to him. He asked me if I would say this before another party, and I told him he could summon me, and I would swear that Dr. Battle said
49 he would let him go to work. I did not say in that conversation in words or substantially that Dr. Battle in that examination never questioned that Mr. Horton's eyes were normal. I don't know anything about the condition of engine 752 on the days that Horton was running it. I only know the condition of the engine when I brought it to Raleigh. I don't know the date. There is no possible way for me to keep track of the engines I have run. I am still working for the Seaboard. I am not under obligations to them. They have not been indulgent to me. There is no case where you could show it, and if they had been indulgent to me that is no reason why I shouldn't tell you the truth.

Dr. K. P. BATTLE, witness for defendant, being sworn, testified:

Direct examination:

I am a practicing physician in the city of Raleigh. I devote my attention to eye, ear, nose and throat. I have been practicing medicine in Raleigh since '86. I attended the University of North Carolina first, then the University of Virginia, and Bellevue Hospital, and I took a special course at the Royal and London Academy of four months, once or twice, at different times; since then, in New York. I am associated with Dr. Lewis in practicing and have been since '86. Dr. Lewis examines the eyes of engineers on the Seaboard Air Line, and did in 1905. He examined them prior to 1905 and since. In his absence I occasionally examined the eyes of engineers; when Dr. Lewis was away I would make a report on a blank furnished by the company. (Counsel hands witness a paper.) The paper handed me is one of the blanks. I filled out this form,

It is all in my handwriting; it was made April 18, 1905; it is J. T. Horton's examination.

50 Paper identified by Dr. Battle is offered in evidence by defendant and marked "Exhibit I."

That is all in my handwriting and filled out by me.

Examination is read by Dr. Battle, as follows:

"Seaboard Air Line Railway.

"Certificate as to Hearing, Visual Power and Color Perception.

"RALEIGH, N. C., *April* 18, 1905.

"Name, J. T. Horton, white. Division, Second. Occupation, engineer. Age, 24. Acuteness of sight and hearing, distant vision. Right eye, 20-70*. Left eye, 20-20, normal. Near vision: No. 2 J from 8 to 4 and even No. 1 at 5 inches with some difficulty. Left eye; No. 1 J, normal. Color sense: Test skeins: Light green. Green: All shares correctly picked. Color sense normal. (Other parts of examination paper not filled out.)

"Examination approved: W. R. Hudson, Supt. of the Second Division. R. H. Lewis, M. D., by K. P. Battle, M. D., Surgeon.

"Date: Raleigh, Apr. 18, 1905. Location: Raleigh.

"Note: There is a very slight linear scar on cornea, visible on close inspection only, which is the cause and the only cause of the slight interference with vision in the right eye. It is very old, and if it ever changes it will be for the better instead of worse. There is no disease in the eye whatever.

"K. P. BATTLE, JR."

The figures 20-70 means that the sized letters that the normal eye should see at 70 feet is seen by that eye at 20 feet. I would say that a man has good sight who has normal sight in one eye and 20-70 in the other. I would say that a man has very fair sight who has normal sight in the left eye and 20-40 in the right eye. That statement shows correctly the result of my examination of Mr. Horton.

51 Cross-examination:

I would say that if a man's eye is reduced from 20-20 to 20-70 he has impaired vision to that extent. That is the way we measure sight. The sized type that a natural eye distinguished at 70 feet he can't see better than 20 feet. I would call that about 20-70 in per cent in that sense. If a man's seeing power is reduced from 70 feet distance and is brought up to 20 feet, when he ought to see an object 70 feet and can only see it a distance of 20 feet, so far as the acuteness of vision is concerned, I would call that just a slight trouble. So far as that eye is concerned, the acuteness of vision would be very serious. I remember how the scar on the cornea of Mr. Horton's eye looked. It was a small, rather whitish line in the lower part of the bulging clear surface in front. At the time you examined him there was no scar entirely across the cornea.

I don't remember the looks of the eye exactly, except as brought to my mind by notes at that time. I said there was a very slight little scar on the cornea, visible on close inspection, not at the very lower part, below the middle. I don't recall the axis. There is a slight tendency in a scar of the kind I saw to absorption. It is the usual course for them to get a little better as the time goes on, but not very much. It ought to have gotten better in five years, if it is going to get better at all. I do not recall examining Mr. Horton after his injury in 1910. I think he was treated for a wounded eye in my office at that time by Dr. Lewis. Very likely, I went in and assisted Dr. Lewis with this man's eyes. I don't remember. I don't recollect telling Dr. Lewis in the presence of Mr. Horton that there was a wound across the cornea. I have no distinct recollection. I think I saw him, but I couldn't swear to it at all. I would not have kept a record of it if I had. The record would be in Dr. Lewis' book in his office. I am still in partnership with Dr. Lewis. The record does not necessarily show whether I aided him in it or not.

52 That might not be in the record in his book; certainly not, whether I was there or not. If I were examining a man's eye and found only 20-70 I would not consider that a slight defect in that eye, so far as the vision is concerned. I looked to see what caused that defect.

It is admitted that the statement has been in possession of the Seaboard Air Line Railway since it was sent in by Dr. Battle.

W. S. Burruss, witness for defendant, being sworn, testified—

Direct:

I am chief clerk of the master mechanic's office. I am located at Johnson Street, Raleigh. (Counsel hands witness a statement signed by plaintiff.) I was present when Horton signed that statement and witnessed it. He made the statement to me. I asked those questions. (Witness reads statement, "Exhibit F.") Mr. Horton's condition was normal at that time, the same as it had always been. He made a statement to me as to what he meant by overlooking to report the engine not having the guard glass. He said it was on account of reports that were being circulated of his having been drunk and carousing around, and he further said it was a wonder he hadn't overlooked a meeting order on trains, from the condition he was in. If an engineer is employed or discharged in case it is a mechanical matter the superintendent of motive power informs the master mechanic, and he (the master mechanic) has control of it. I never received any notice that Mr. Horton had been dismissed. I asked Mr. Horton what he meant when he said he was worried. He said it was natural for him to be worried when reports were being circulated and it was reported to Mr. Hix that he had been drinking.

Cross-examination:

Horton said it was on account of his being so worried and troubled; in other words, when a man feels like he is about to lose his

53 job his frame of mind is such that he will not remember much. Horton said he was worried on account of reports

being circulated and on account of the danger of losing his job. He said it was a wonder he hadn't overlooked a meeting order and run into a train. He said he was so worried he didn't notice missing the water glass. He said in the written statement that I read, that the glass was missing, that he did not report it because in his frame of mind he overlooked it. I am in the employment of the Seaboard Air Line and clerk to Mr. Bissett. At the time the guard glass was missing, I don't think we had one in stock, but we had a glass that could be cut. We cut them and put them in for several different engineers. Davis was there then; Porter was there then, and Branch also cut them. At the time that Horton was hurt, the men claimed they were cut for the engine. I did not see them cut it. I had reports. Horton didn't tell me that he was suffering so that he couldn't make out a report for anything. He may have had a little black flap on his eye that he wore around town. I didn't notice it at the time. I was getting that statement for the purpose of getting facts in the case and laying them before the superintendent. W. L. McDowell made out Form 408. He was about 19 years old. We don't require the engineer to make them out usually. I have got several that were made out on the typewriter. Horton didn't feel like making out Form 408 that day, I reckon.

Redirect:

The paper handed me by counsel was read and signed by Mr. Horton.

Defendant offers paper in evidence marked "Exhibit —."

Defendant offers in evidence release signed by plaintiff, marked "Exhibit G."

LEWIS ARCHER, witness for defendant, being sworn, testified:

Direct examination:

I am foreman in S. A. L. shops here—general foreman.
54 I was general foreman here in August, 1910. I recall the time that Engineer Horton claims to have been injured at Apex. I got on that engine the afternoon that Engineer Horton came on it. Discovered it had no guard glass. Water glass was broken. Cab didn't have anything wrong with it; it was clean. When water glass explodes as the result of steam pressure, there is muddy water over the cab. There was no evidence of that. I saw no glass in the cab. I saw that the glass was broken and there was no guard glass. I saw no indication of glass bursting. I have had thirty years' experience, ever since I was 15 years old. During that time have been machinist. I am familiar with the construction and operation of engines. I am familiar with the construction of the Buckner water gauge and the operating of same. In my opinion, it is the finest water glass shield I have had anything to do with. I had the material here out of which the guard glass could have been made.

Counsel hands witness a piece of glass about one-fourth inch thick, and asks if that is the kind of glass he had. He answers "Yes."

There is a supply of that glass on hand. It could be cut in that

shape. With those two pieces in the Buckner gauge, the Buckner water glass is just as safe as it would be with the other glass; if anything, better.

Q. As soon as you ascertained that this water glass was broken and the guard glass missing, what did you do, with regard to supplying the guard glass for the water gauge on that engine?

Objection by plaintiff. Sustained. Defendant excepts.
Exception No. 18.

Defendant offered to show by this witness that he cut the necessary glass and placed it in the Buckner gauge on the engine used by Horton.

55 Q. Did you see any of this glass cut on the evening of August 4, 1910?

Objection by Plaintiff. Sustained. Defendant excepts.
Exception No. 19.

It is the duty of inspectors to inspect engines below the running board. It is the duty of the engineer to inspect the cab. The engineer has a form and must report all defects at the end of each trip. We have got a little yellow form for that purpose. When the engineer makes this report, the round-house clerk copies it off and gives to each man his work. The report is made by the engineer in writing. It is required to be made in writing by the engineer before the work will be done. This engine was equipped with gauge cocks. An engine can be operated with gauge cocks alone, without a guard glass. I am familiar with the duties of an engineer. It is an engineer's duty, if he discovers that his guard glass is gone to report it and to refuse to go out until one is given to him.

Cross-examination:

I couldn't tell in what condition the gauge cocks on engine 752 were, on that last trip that Mr. Horton started out on. There was a bulletin issued there some time ago that the old pipe to guard glass must be taken off and the Buckner glass to succeed it. That is all I remember about the bulletin. Glass had been cut for this water gauge, because, just about sixty days before, one was taken from Mack Tye's engine and he asked for one and refused to go out until he got it. That was engine 40 or 41. He wanted the glass like that to put it on his engine. Somebody took his, I suppose. They are very valuable for a water glass. Some man may have broken his.

The arc man is supposed to test the air and electricity. He
56 goes above the board. He goes in the cab. He inspects the air and electric lights. It is his duty to inspect that before they go out. He is not called the inspector at all. He does the testing. He does not inspect.

J. B. PENDLETON, witness for defendant, being sworn, testified:

Direct examination:

I am an engineer. Have been with the Seaboard all my life—thirty years. I am familiar with the duties of an engineer. The

duties of an engineer when he gets on his engine are to look after everything and see that everything is in shape, to the best of his knowledge. If engineer should find any defect in his water glass before starting on his run, it is his duty to report it. If he discovers a defect in water glass while on the line of road, or if the guard glass should be missing on the line of road, it is his duty to shut it off. Engineer can run his engine all right with gauge cocks. I have run an engine without a guard glass. In my first railroad experience I did not have any guard glass or water glass. I operated engine twenty-odd years, or more, without a guard glass. It is safe to run an engine with gauge cocks. I am familiar with the equipment of engines on the Seaboard Air Line Railway of the 752 class. I practically know the equipment of all engines on the Seaboard Air Line Railway. I have not run engine 752, to my knowledge. Engines on the Seaboard Air Line Railway are equipped with gauge cocks and water glass. They were in 1910. It is the duty of an engineer, in regard to the condition of gauge cocks, while on the run, to see that they are properly opened and in working order. At that time, in 1910, it was the duty of engineer, in regard to inspecting his engine, to see that everything was in good shape and all right, particularly above the running board and in the cab. The object of the guard glass used in connection with the Buckner water gauge is to keep that glass from flying if the glass should happen
57 to break. With the guard glass in position, the Buckner water gauge is, I think, absolutely safe. Without the guard glass, I think the Buckner water gauge is dangerous. Those inner glasses are subject to breaking. I have had them to break with me many a time.

The COURT: Why is the water glass put on the engine at all?

A. It is an additional safeguard, to carry the water more uniformly. You can see better. You can determine with the gauge cocks how much water there is in the boiler. I am familiar with the duties of inspectors on the Seaboard Air Line Railway. It is their duty to inspect all machinery below the running board on the side underneath the engine. When the water glass explodes by reason of steam pressure it messes up everything and you have to have a general cleaning up.

Cross-examination:

If I had to start to-morrow morning on an engine, and this evening found out that guard glass was gone, I would not go. I would shut off steam. If I was running the engine in this evening and discovered the glass was gone, I would report it on my work report. If the flag was missing I would get another before I went out. If torpedoes were missing I would put it on my work report. I always find them on my engine. If the glass was missing the morning before I started out, I would put it on my work report. I would put it down in writing to protect myself. I don't know anything about the practice of they going and notifying the foreman and he makes a written requisition, or his clerk does, on the storekeeper himself. I don't know what the rule is at Johnson Street. It is not the in-

spector's duty to inspect under locomotive. The inspectors of locomotives do not go in the cab at all. The condition of the boiler is ascertained from my report. The boilermaker ascertains whether the stay bolts are right in the boiler. He inspects the stay bolts. The government requires him to do that once a month. He
58 does not inspect the water glasses; the engineers do that. I am still with the Seaboard. I get eight or eight dollars and a half as a witness. When I am not a witness I make $7.43. I have never been a witness except for the railroad.

Defendant closes, reserving the right to examine Mr. W. T. Smith. Plaintiff introduces the following testimony in rebuttal:

CHARLES H. MURRAY, witness for plaintiff, being sworn, testified:

Direct examination:

I am a flagman on the Seaboard. I have been in the employment of the Seaboard twelve or fourteen months. In August, 1910, I was working for the Baker-Thompson Lumber Company, Raleigh. In July, 1910, I was working for the Baker-Thompson Lumber Company, Raleigh. I have known J. T. Horton three or four years.

Q. State whether or not he said anything to you at any time, if so, when, in respect to cutting glass for him for the water gauge?

Objection by defendant. The Court overruled the objection and stated in the presence of the jury that this is competent only as corroborative testimony. Overruled. Exception.

Exception No. 20.

A. He came to me about the first of August, 1910, and told me he would like to get me to cut him a water glass; he had heard I had been cutting some.

Q. Who had you been cutting them for?

Objection by defendant. Overruled. Exception.

Exception No. 21.

A. For two or three engineers on the Seaboard, First Division.

59 Q. Why did he state that he wanted you to cut him one?

Objection by defendant. The Court overruled the objection and stated in the presence of the jury that this is competent only as corroborative testimony. Overruled. Exception.

Exception No. 22.

A. He said he did not have any on his engine, and that there were none in the storehouse, and he wanted me to fix it. He said they didn't have any in the storehouse. Powhatan Matthews asked me if I cut the glass. He asked me if Mr. Horton asked me to cut it for him. I told him he did. It was about the first of August that Mr. Horton asked me to cut the glass—before he was injured.

Cross-examination:

I was glazier at Baker-Thompson Lumber Company. I would cut this guard glass out of plate-glass. It runs in different thicknesses,

anywhere from one-eighth to three-eighths. It would be three-eighths to one-eighth, according to the different kind of glass. I cut Mr. Horton a glass afterwards. I think it was after he was hurt. I didn't get anything for cutting it. I cut it as an accommodation.

J. A. MASSEY, witness for plaintiff, being sworn, testified:

Direct examination:

I live in Raleigh. In August and July, 1910, I lived in Raleigh. In July and August, 1910, I was working at Johnson Street store room, Seaboard Air Line Railway. I was night clerk. I think I went there in January, 1910. I am not with the Seaboard now.

Q. I wish you would state to the jury if you know what
60 the custom and practice was in respect to engineers obtaining supplies for their locomotives.

Objection by defendant. Overruled. Exception.
Exception No. 23.

A. It was customary for engineers, when they wanted to get supplies out of the store room, to go to the general foreman and get a requisition for whatever they wanted. I have no knowledge of the engineer making a demand in writing on the foreman. I know the Buckner water gauge.

(Counsel exhibits water glass to witness.)

I don't think it would take a learned mechanic or machinist to drop that glass in that hole that way. If the engineer discovered that his guard glass was gone from his engine, it would have been his duty to have gone to the foreman or general foreman and asked for a requisition for a guard glass, or whatever it was he wanted. It was the general custom as to repairs that they want done. They are supposed to put them down on a slip, known as the work report. They didn't have any of those glasses in stock when I was there, that I have any knowledge of. I was night clerk at the time Mr. Horton was injured.

Cross-examination:

They had glass down there for headlights—heavy, thick glass. As storekeeper I was required to show a requisition for the stuff that I let go out of the store room—a written requisition. When an engineer wanted anything out of the store room he had to show a written requisition, and I would let him have it. That requisition had to be signed by the foreman in order to empower him to let the property of the Seaboard go. The rules of the company required that the work reports of engineers, for the purpose of repairing defects and getting necessary appliances for their engines, should be made out in writing. They did not pass through my hands.
61 I couldn't give positive information about them. I am in the insurance business now. I left the service of the Seaboard last April a year ago, or May, about that time. I resigned.

I had no trouble with the company before I left. I am not an engineer. I never have run as an engineer. I have had no experience with work reports or engineers' department of railroad business.

Redirect:

I know by observation what the practice was down there.

Recross-examination:

Those things were not in my department.

Redirect:

But the supplies were in my department, and I know how they were gotten from there.

ERNEST HORTON, witness for plaintiff, being sworn, testified:

Direct examination:

I am a locomotive engineer. I am with the Atlantic Coast Line. I have worked for the Seaboard Railroad lacking a few days of being four years. I was employed by the Seaboard Air Line in July and August, 1910, on the Second Division. My headquarters were at Raleigh. I am a brother of the plaintiff, J. T. Horton. I live at the same house. I remember when he was injured at Apex. I had a trip just before he got hurt and a trip right behind him on the same engine. On the trip made on that engine just before he was injured the engine had no guard glass.

62 Q. How was it on the trip just after the injury?

Objection by defendant. Overruled. Exception.
Exception No. 24.

A. It had a little thin glass in that shield there. It was very greasy from machinists handling it, so that I couldn't see the water tube to locate the water level in the boiler, and I taken it out and cleaned it. It was so thin it shook; this way (indicating, and when I got to Cary I cut wedges and stuck in here to steady the glass, to keep it from jarring back and forth in the groove of the shield. When I discovered that the glass was out of here, when I made the trip I went to the foreman and told him that there was no shield glass.

Objection by defendant to answer, and motion to strike out. Overruled. Exception.
Exception No. 25.

They have two foremen—one day and one night foreman. I went to Mr. Dean, the night foreman.

Q. What was the custom and practice down there when a shield to the guard glass or tube or any part of the engine was missing in the cab?

Objection by defendant. Overruled. Exception.
Exception No. 26.

A. The inner tube—there would be a machinist's report—but as to that shield glass there, I could get a requisition and go to the store room and get it and drop it down. Anybody could drop one in, just as you are doing that now. I would apply to the foreman for the requisition, verbally. The foreman's clerk makes out the requisitions and we carry them to him to get him to O. K. them. The guard glass, bolts, nuts, anything for repairing machinery, is kept in the store room—flags, torpedoes. We go to the foreman and get a requisition and draw them. All the engines are equipped
63 with this tube, but not that style of shield. Only three or four engines were equipped at that time with this Buckner shield. This engine was the first one I ever ran with the Buckner shield on it. The office of this glass is to gauge the level of the water in the boiler—to have it uniform, to see it.

Q. State if it was the custom and practice of engineers down there to run their engines without the guard glass at all.

Objection by defendant. Overruled. Exception.
Exception No. 27.

A. As to that special kind, I only run this engine with that, but the old shields that we did run without any guard glass on.

Objection by defendant to answer. Overruled. Exception.
Exception No. 28.

Q. State what was the duty of engineer if he found the guard glass gone, whether or not it was his duty to shut off the guard glass and run with the gauge cocks.

Objection by defendant. Overruled. Exception.

Exception No. 29.

A. I never did it.

Objection by defendant to answer. Overruled. Defendant excepts.

Exception No. 30.

It is the duty of inspectors at Johnson Street to inspect engines completely—give a thorough inspection and make a report on them—the entire engine. After J. T. Horton was injured, I followed him in here that afternoon. I forget what train I was on. I saw him at 6:30 that afternoon. He was suffering very much. I saw the eye itself that evening. It was very much inflamed. He couldn't bear the light on it; so I didn't make any close inspection right then, but next morning I dressed his eye. I taken the
64 bandages off. They had salve and liquid form in a bottle, and a dropper to suck it up out of the bottle and drop it in his eye. I would know the medicine if I were to see it again.

(Counsel shows witness medicine and eye dropper and salve.)

That is the salve I used; that is the liquid form, and that is the dropper. I would drop it in his eye.

Plaintiff's counsel introduced in evidence two bottles of liquid and jar of salve, with eye dropper, the labels on bottle showing numbers 101954 and No. 104435.

Objection by defendant. Overruled. Defendant excepts.

Exception No. 31.

I examined his eye three or four days afterwards. Across his eye near the pupil was a deep sink; seemed like the outer tissue was torn, and his eye was still very much inflamed at that time. That was a fresh wound, the only scar. He suffered very much with it for five or six weeks. He didn't dare let the light touch his eye. He kept cotton behind his dark glasses that Dr. Lewis gave him, which he bought and wore for probably two or three months until he could induce his eye to come out to the light from behind those specs. He was very restless at night. I stayed in the same room with him, and he would get up once or twice in the night and use his eye dropper in his eye. I examined his eye from that time on. The scar was still there, and it has not passed away. Jim is not as old as I am. I used to nurse him when he was a baby. He never received an injury to his eye in his life when a child. He said his vision was very much impaired after this injury, so that he could not distinguish off yonder. He used to be in a military company. He was a good marksman from his right shoulder. He shot with his left eye closed. That was in 1900 and 1901—before he ever started railroading. He was an excellent bird shot. He ranked foremost for target shooting in the military company. He fired from 200 to 1100 yards.

65 Cross-examination:

Under the Brotherhood agreement in force in July, 1910, it was the duty of the engineer to give his engine just a reasonable inspection, and you went to your work report and put down the defects in writing. That report was put on file in the roundhouse, and that was taken by the foreman and the work distributed among different people who had charge of the work, and the defects were repaired by workmen. Things were reported that it was discovered the engine needed. I knew the guard glass was gone on this engine on the first trip I made on it on August 1st. I don't recollect making a statement that I didn't know it was gone.

(Counsel shows witness a paper.)

That is my signature. Chief Clerk Burruss was there when I signed it. I was asked this question: "Did you notice whether or not this fixture was equipped with water glass guard or whether or not this guard glass was in place," and I answered, "As stated above, I took no particular notice." I was trying to protect myself when I said I was not swearing to that statement. The guard glass did not have any water glass shield on her. The purpose of that glass was to protect your eyes from that glass tube bursting. I don't know what causes them to explode. I can't figure it out. I am not an expert. When there is no guard glass and they explode, the

glass is scattered and the engineer's eyes are in danger. Engines are operated without them. You can never tell exactly when one is going to explode. It don't give you any warning. They explode without giving any notice. You couldn't regularly run with a uniform amount of water without the glass. I have run an engine without the glass. I would not let the water get down below the bottom gauge cock. When we come in from a trip with an engine we make out a work report and sign it. Engineer is required to put his name on it so as to identify his name with the engine.
66 That is for the purpose of knowing who had that engine in the event anything should happen afterwards, and to see whether the work report called for that work and to check it up with the men who did the work. Different machinists do the work on the engine. In lots of instances I know they did not repair defects. A bad eccentric could break and strip your engine, tear the rods out, tear the cab out, and maybe sling you out in the woods. I would accept an engine in that condition just like I have other things. You had to accept them if you wanted to hold your job. An engineer before he is discharged is entitled to a hearing under the organization of locomotive engineers. I was given a hearing. The company discharged me and the Brotherhood expelled me.

GEORGE STEELE, witness for plaintiff, being sworn, testified:

Direct examination:

I am engineer on the Seaboard. I am at present employed by them. I have been an engineer seven or eight years. I heard a conversation between Edgar Barbee and Jas. T. Horton. I don't remember exactly when it was. We were standing by the Masonic Temple. It was something like two or three months after Horton was hurt. Mr. Barbee came up and was sympathizing with Horton about getting hurt. Several words passed, and Mr. Horton told him he was having some trouble about settling with the company, and Mr. Barbee said, "I know they can't say there is anything the matter with your eyes, for you and I were in Dr. Lewis' office together, and we stood a satisfactory examination." Mr. Horton asked Mr. Barbee to give him an affidavit in case something would happen, and he told him that was not necessary; that he would just make me a witness in case anything happened.

Cross-examination:

They just said they both stood the examination in Dr. Lewis' office together, and wasn't questioned. I have been an
67 engineer on the Seaboard six or eight years. I am familiar with the duties of an engineer. It is his duty to see that his engine is in proper working order and properly equipped. He reports 30 minutes beforehand for that purpose. He is paid for that time. He is paid until he gets off duty. He is allowed 15 or 20 or 25 minutes from the time he cuts loose from his train. Engineers are supposed to inspect engines before they give them up and make out a work report in writing. It is required by the company

to be in writing and signed by the engineer. That work report is filed in the roundhouse, and the work distributed among different ones to have the defects remedied. It is the engineer's duty to report defects dicovered in his cab and report them on his work report. When an engineer gets on his engine in the morning he tests the gauge cocks to see that they are working. He tests his gauge glass to see that it is in shape and in working order. The gauge cocks indicate how much water is in the boiler. You could operate the engine with gauge cocks alone without the water glass. The water glass is arranged so that if anything should happen you could cut it off, top and bottom, that cuts it clean out so that it is impossible for it to explode. But with the steam on and the water on and this guard glass gone, that inner tube is nothing but a thin tube of glass. Whatever pressure the engine carries is on there. Those glasses explode frequently. Nobody can tell when one is going to explode. One might last 15 minutes and one 30 days. One has never exploded with me. They buzz a little when they are going to explode. The purpose of the guard glass is to protect anybody in the cab. It protects the engineer from explosion. Without the guard glass he is liable to be injured by flying glass.

Redirect:

I suppose these glasses could be obtained from the store room. In getting articles from the store room you notify the
68 foreman verbally and you get a requisition. I never drew a guard glass. I have never operated one of those glasses.

Recross-examination:

On the line of road if I discovered the guard glass was gone I would report it in writing on the work report when I got in. It could be gotten by requisition from the store room. My duty would be to notify the foreman. It is the engineer's duty to report any defects they see on the engine in writing.

Redirect:

We never report that torpedoes are gone. We never say anything about the flag being gone. The hostler is supposed to put those things on.

Recross-examination:

When we come in we make the request in writing, and when we go out we make it verbally.

Dr. A. W. Goodwin, witness for plaintiff, being sworn, testified:

Direct examination:

I live in Raleigh. I practice medicine. Am a general practitioner. I studied at Bellevue Hospital, Medical College of New York. Was admitted to the practice of medicine in this State and given a license. I have been practicing in Raleigh 25 years and 4 months.

I know J. T. Horton. I examined him for insurance in the Brotherhood of Locomotive Engineers. I signed that paper (indicating).

(Counsel hands witness a paper.)

The paper is dated November 30, 1905. Physical examination for locomotive engineers' insurance.

I wrote every word that appears in there. I made an examination of Mr. Horton in my office. I tested his eyes in a general
69 way. They seemed to be in good condition. I tested both eyes separately. I had him to cover his eye with his hand and see what distance he could read ordinary reading matter. I mean both big and little type. He read both with either eye. Besides that he read signs in the street. I asked him about Wilder and Dewar's sign. That is at the head of Martin Street. My office is on the west side of Fayetteville street, and his is on the east side of Wilmington street. He read it from my office. Physically I found him to be in very good condition.

Plaintiff offers in evidence paper showing examination of plaintiff by Dr. A. W. Goodwin for the purpose of securing insurance, the paper containing the statement that he examined plaintiff on November 30, 1905, and that he had two good eyes. Defendant objects. Objection overruled. Defendant excepts.

Exception No. 32.

The Court stated to the jury that this paper is admitted as corroborative evidence only.

Cross-examination:

I considered the applicant in such condition of health as to recommend him a proper party to be insured. That seems to be an insurance organization. It insures the lives of engineers. I had Horton just simply reading. I didn't have any test letters. I made a casual examination of his sight. I was not making that careful examination of his eyes that would be made by an occulist who is determining accurately the extent of the vision in his two eyes. I made the examination to see whether he could run well enough—I had in my own mind an engine. He was fireman, engineer, or something on the Seaboard. In my examination of his sight I took into consideration that he was running on a railroad. I knew he was running on the railroad. I had known him before. I didn't make this examination of the eye by the Snelling test; that is
70 not in my practice. That particular form of examination is done by specialists as a rule. If the patient should come to me with defective sight, I would send them to somebody else. Specialists have means and apparatus for testing sight. I made this examination only in a general way. Dr. Battle has been practising here a number of years. I don't know just exactly. I should say 20 some odd years. He is a specialist of eye, ear, nose and throat. He is in good standing here. Stands well in this community as a specialist. He is among the foremost, I think.

Redirect-examination:

If the jury should find from the evidence that Horton has got 20-70 sight in one eye and normal in the other, would he, in your opinion, be suited for a railroad engineer' duties?

Objection by defendant. Overruled. Defendant excepts.

Exception No. 33.

A. I should not say so. That is my general opinion.

Q. In your opinion, could a man with an eye like that pass the examination that you put to this man?

Objection by defendant. Overruled. Exception.

Exception No. 34.

A. I do not think he could have read the print I showed him.

Recross-examination:

I did not undertake to get his percentage of sight in the two eyes.

Redirect:

He seemed in a general way to read as well with one eye as the other.

71 J. T. HORTON, plaintiff, recalled:

Direct examination:

Mr. Shot, whose eyes were injured on the Seaboard, lived at No. 9 Polk Street, between Wilmington and Blount. I never went to Mr. Shot's in company with Mr. Hopkins. I went there once. I was not there Sunday. When I went my brother Ernest went with me. Dr. Lewis and my brother Ernest dressed my eye after I was hurt, and my other brother and my mother. My mother is at home now. She is an invalid. Dr. Battle tested my eyes when I was promoted. At that test he didn't say anything about any difference in the seeing powers of my right and left eye. I didn't discover any. I could read as well with my right as my left eye, at a distance, and close, too. I have never made any statement to Dr. Battle about any injury received by me. I have never in my life made a statement to Mr. Hopkins about any injury received by me. I signed this report that Dr. Goodwin read. That was an application for insurance in the Brotherhood. They required it of you. You have to have two good eyes to get it. After Dr. Goodwin got through with that report it was carried into Division 339 at open meeting and read before the engineers to see if there was any reason why I should not receive that $3,000 insurance. No objection was made to it. In about 30 or 40 days after this injury the doctor in Norfolk made that examination. I belonged to the State Guard in 1898, 1900, 1901 and 1902, I think. I did target shooting every year. I was with the first always—thrown in the first squad. I shot from 2 to 1100 yards. My right eye was used in aiming. The government requires it. Benton did

not say anything to me about the guard glass being broken. I saw no signs of broken glass there. Claude Orral was conductor on that train at Apex. He is here. He came in the cab immediately after the explosion. The brake men were Willis Crump and Bill Crump. They were checking freight out of the box car. They are here. Both are working for the Seaboard. Orral is still conductor.

72 I suppose Dr. Lewis made 15 or 20 examinations of my eye after it was hurt. He gave me medicine. He put the medicine in my eye that he kept in the office. Dr. Lewis was in the courthouse yesterday.

It is admitted that Dr. Lewis is under subpœna by defendant.

Plaintiff stands aside in order that Mr. W. T. Smith, witness for defendant, may be examined. Objection by plaintiff to the examination of Mr. W. T. Smith. Overruled. Plaintiff excepts.

W. T. Smith, being sworn, testified:

Direct examination:

I live in Raleigh. I am a stenographer. Have had off and on 20 years' experience reporting cases in court. I reported the case of J. T. Horton v. S. A. L. Railway in 1911 at Wake Superior Court. I transcribed the notes that I took at that time. I took down the evidence stenographically and transcribed it on the typewriter. That is a copy of the notes that I transcribed.

(Counsel hands witness papers.)

I delivered a copy to plaintiff's counsel and also to defendant's. This is a true and accurate transcription of the notes taken at the trial. Mr. Horton gave the testimony as appears in that transcript.

Defendant offers in evidence parts of the stenographic report taken at the former trial of this case.

No exception was taken by either side to any of the evidence that I transcribed.

(Counsel reads from reports taken at former trial.)

Q. "When did you say anything to Matthews about the guard glass being out of place?

A. After the first and second trips I ran the engine.

Q. Where was that conversation?

A. At the clinker pit or coal chute. I presume that is all his answer to that question. If there had been an addition it would have been in.

73 Cross-examination:

I think the notes of the evidence were taken at the instance of the Seaboard Air Line. There was permission for the other side to have a copy of the notes if they wanted it. I have no independent recollection out side of that record. Reporting a case stenographically is largely mechanical. Sometimes you have a little difficulty; witnesses

say something that you would lose. You would not be apt to lose any material part.

Redirect:

Q. You are unfortunate enough to be my uncle by marriage?
A. Yes, I believe so.

Plaintiff offers summons in evidence and portions of complaint and answer.
Plaintiff closed.
Defendant offered in evidence statement of E. C. Horton of August 11, 1910, marked Exhibit J.

LEWIS ARCHER, recalled by defendant:

After Horton brought this engine in I got up in the cab, and found the guard glass was gone. I saw that a guard glass was put on there. It was two pieces of glass.

Defendant closes.
At the close of all the evidence defendant renews the motion of non-suit under the Hinsdale Act, and to dismiss the action.
Motion overruled. Defendant excepts.
Exception No. 35.

EXHIBIT A.

Seaboard Air Line Railway. Form 684.

Report on Condition of Engine No. 752 After Careful Inspection on Arrival at Ral. 5:45 p. m., 7-30, 1910.

74 Engine is in good condition with the following exceptions:
Road brake beam and back tank truck brake. Adjust piston travel to tank. It is about 12 inches long. Clean brake cylinder to tank. Brakes on engine and tank no good.
Train pipe pressure: 50 lbs.
Main drum pressure: 60 lbs.
Safety valve lifts at: 200 lbs.
Safety valve seats at: 195 lbs.
State whether this engine throws fire dangerously?
No.
(Signed) J. T. HORTON, *Engineman.*

NOTE.—Enginemen must carefully inspect their engines after each trip and report their condition on this form whether needing repairs or not. They will be held responsible for defects not reported. No attention will be given to verbal reports or reports not signed by enginemen.
Raise seat box 8 inches.

(On opposite side.)

Repaired at.....on..... 191...

The following repairs were made to engine No. .....

Repairs made by.....

Name of workman in charge of work.

Approved by
P. M. M.,
Foreman Roundhouse.

NOTE.—Workmen in charge of the work will sign for the repairs done and must be approved by foreman roundhouse and forwarded by him to Master Mechanic.

EXHIBIT B.

Seaboard Air Line Railway. Form 684.

Report on Condition of Engine No. 752 After Careful Inspection on Arrival at Ral. 5:45 p. m., 7-30, 1910.

75 Engine is in good condition, with the following exceptions: Collars to front end of both side rods work loose. Put new rings in air end of pump and examine valves. Pump don't keep up pressure. Examine steam end of pump. It stops all over.

Train pipe pressure: — lbs.
Main drum pressure: — lbs.
Safety valve lifts at: — lbs.
Safety valve seats at: — lbs.
State whether this engine throws fire dangerously. —.
(Signed) J. T. HORTON, *Engineman.*

NOTE.—Enginemen must carefully inspect their engines after each trip and report their condition on this form, whether needing repairs or not. They will be held responsible for defects not reported. No attention will be given to verbal reports or reports not signed by enginemen.

Put new bushing in R. nuckle pin.

(On Opposite Side.)

Repaired at —— on —— —, 191-.
The following repairs were made to engine No. 752.
Examined valves and rings in air end of air pump and put all of them back.

BYNUM.

Tightened side rod collar. Renewed R. nuckle bushing.

MITCHELL.

Repairs made by —— ——.
Name of workman in charge of work.
Approved by
P. M. M.,
Foreman Roundhouse.

NOTE.—Workmen in charge of the work will sign for the repairs done and must be approved by foreman of roundhouse and forwarded by him to master mechanic.

76 EXHIBIT C.

Seaboard Air Line Railway. Form 684.

Report on Condition of Engine No. 752 *After Careful Inspection on Arrival at Ral.* 3:30 *p. m.,* 7-28, 1910.

Engine is in good condition, with the following exceptions:
Engine brakes don't hold leak off; connect up tank brakes. Put brake shoes on where needed. Set up both main wedges. Put new rings in air pump and examine.
Train pipe pressure: — lbs.
Main drum pressure: — lbs.
Safety valve lifts at: — lbs.
Safety valve seats at: — lbs.
State whether this engine throws fire dangerously. —.
(Signed) J. T. HORTON.

NOTE.—Enginemen must carefully inspect their engines after each trip and report their condition on this form, whether needing repairs or not. They will be held responsible for defects not reported. No attention will be given verbal reports or reports not signed by enginemen.
Flat places on D. wheels.

(On Opposite Side.)

Repaired at —— on —— —, 191-.
The following repairs were made to engine No. —.
Both M. wedges set up; brakes fixed. Mitchell.
Repairs made by —— ——.
Name of workman in charge of work.

Approved by
E. C. D.,
Foreman Roundhouse.

NOTE.—Workmen in charge of the work will sign for the repairs done, and must be approved by foreman of roundhouse and forwarded by him to master mechanic.

77 EXHIBIT D.

Seaboard Air Line Railway. Form 684.

Report on Condition of Engine No. 752 After Careful Inspection on Arrival at ——, —— M., 7-28, 191-.

Engine is in good condition, with the following exceptions:
Valves—pack air and steam end of pump. Eng. pounding. Bad in all D boxes and rod bolts to both front end of both side rods work loose. Reduce brass to back end of both main rods.
Train pipe pressure: 60 lbs.
Main drum pressure: 70 lbs.
Safety valve lifts at: 200 lbs.
Safety valve seats at: 195 lbs.
State whether this engine throws fire dangerously. No
(Signed) J. T. HORTON, *Engineman.*

NOTE.—Enginemen must carefully inspect their engines after each trip and report their condition on this form, whether needing repairs or not. They will be held responsible for defects not reported. No attention will be given to verbal reports or reports not signed by enginemen.

(On Opposite Side.)

Repaired at ——, on ——, 191-.
The following repairs were made to engine No. —.
Sand pipes opened. Hester.
Repairs made by —— ——.
(Name of workman in charge of work.)

Approved by
E. C. D.,
Foreman Round-house.

NOTE.—Workmen in charge of the work will sign for the repairs done, and must be approved by foreman of roundhouse and forwarded by him to master mechanic.

78 EXHIBIT E.

Seaboard Air Line Railway Schedule of Rates, Rules, and Regulations.

"49. Engineers will give their engines reasonable inspection, but will not be required to go underneath them."

EXHIBIT F.

Statement of Engineer J. T. Horton, Covering Injury to Right Eye, Account Water Glass Burst on Engine 752, at Apex, August 4th, Parts of Glass striking Him in Right Eye.

RALEIGH, N. C., *August* 9, 1910.

I had stopped engine 752 on house track at Apex with local car-, and was facing water glass when glass burst, parts of flying glass striking me in right eye, cutting same; extent of damage to eye not yet known.

Q. What kind of water glass fixture was engine 752 equipped with?

A. Special water glass fixture, which, I understand, was gotten up by Engineer Buckner.

Q. Was this fixture equipped with guard glass when trouble occurred?

A. No, sir. It has had no guard glass on it since I have been running this engine.

Q. Did you know the construction of this fixture—that is, what is required?

A. Yes, sir; I knew this fixture was constructed for guard glass.

Q. According to your statement, this fixture was not equipped with guard glass when you made first trip on engine, July 28th. According to register, you made three trips of this engine since July 28th. Had you made any report as to this fixture not being equipped with guard glass?

A. No, sir.

Q. Why?

A. Overlooked reporting guard glass in water shield for causes best known to myself.

(Signed) J. T. HORTON.

Witness:
W. S. BURRUS.

79 EXHIBIT G.

Seaboard Air Line Railway—Release.

For and in consideration of the sum of ten and 00-00 dollars ($10.00) to me paid, the receipt of which is hereby acknowledged, I, J. T. Horton, do hereby release and forever discharge the Seaboard Air Line Railway and any and all railroads owned, leased, operated or controlled by it, and its successors, from all claims and causes of action for or by reason of the injuries received by me, caused by water glass bursting and particles of same flying in his eye, on or about June 10, 1903, at or near Raleigh, N. C., while a fireman in the employ of the Seaboard Air Line Railway; the consideration hereinbefore referred to being in full compromise, satisfaction and

discharge of all claims and causes of action arising out of the injuries and in exoneration of the railway from all liability by reason thereof.

In witness whereof, I have hereunto set my hand and seal, this 29th day of July, 1903.

(Signed) J. T. HORTON.

Signed, sealed and delivered in the presence of

A. P. JOHNSON.

EXHIBIT I.

Seaboard Air Line Railway—Certificate as to Hearing, Visual Power, and Color Perception.

RALEIGH, N. C., *April* 18, 1905.

Name: J. T. Horton; white.

Division: Second. Occupation, engineer; age, 24.

Acuteness of sight and hearing: Distant vision—right eye, 20-70; left eye, 20-20; normal.

Near vision—right, No. 2 J from 8 to 4 in and even No. 5 in, with some slight difficulty. Left eye, No. 1 J; normal.

80 Hearing—right ear, whisper at 6 ft.; normal. Left ear, whisper at 6 ft. normal.

Color sense: Test skeins, light green. Names given —; selection of similar tints.

A. Green, all shades correctly picked. Color sense normal.

B. Rose.

C. Red.

D. Blue.

Flag shown — Name — Remarks —.

Soiled white.

Soiled green.

Soiled red.

Soiled blue.

W. R. HUDSON.

Examination approved.

R. H. LEWIS, *M. D.*,

By K. BATTLE, JR., *M. D.*,

Supt. Second Division, Surgeon.

Date: Raleigh, Apr. 18, 1900. Location, Raleigh.

NOTE.—There is a very slight linear scar on cornea, visible on close inspection only, which is the cause and the only cause of the slight interference with vision in the right eye. It is very old, and if it ever changes it will be for the better instead of worse. There is no disease in the eye whatever.

K. BATTLE, JR.

Exhibit J.

Statement of Engineer E. C. Horton, Relative to Condition of Water Glass Fixture on Engine 752.

Raleigh, N. C., *August 11th*, 1910.

I made round trip on train 1 and 2, August 1st and 2d.

Q. Did you notice what kind of water glass fixture was on engine on this trip?

A. I didn't pay any particular attention to water glass fixture engine was equipped.

Q. Did you notice whether or not this fixture was equipped for water glass guard and whether or not this guard glass was in
81 place?

A. As stated above, I took no particular notice of this fixture, and I did not know whether or not this fixture was equipped with guard glass.

Q. Did you notice water glass to see how much water you were carrying?

A. I did.

Q. You state that this was the first engine you have run with special fixture, did you notice on this trip that engine was equipped with special fixture?

A. No; I did not notice this special fixture.

Q. You also went out on engine 752 train No. 1, August 5th, did you notice construction of this fixture on that date?

A. I did.

Q. Was fixture equipped with guard glass?

A. Yes; for I took it out and cleaned it at Johnson Street in order to enable me to see water.

(Signed) E. C. HORTON.

Witness:
W. S. BURRUS.

Defendant's Requests for Instruction.

The defendant in apt time in writing requested the Court to instruct the jury as follows:

1. The Court charges you that if you believe the evidence the plaintiff was not injured by any negligence on the part of the defendant and you will answer the first issue "No."

The Court refused to give this instruction, and defendant excepts.

Exception No. 36.

2. The Court charges you that if you believe the evidence of the plaintiff assumed the risks of the injury from the explosion of the water glass, and you will answer the second issue "Yes."
82 The Court refused to give this instruction. Defendant excepts.

Exception No. 37.

3. If you do not answer the second issue "Yes," then the Court charges you that if you believe the evidence, the plaintiff, by his own negligence contributed to his injury, and you will answer the third issue "Yes."

The Court refused to give this instruction. Defendant excepts.

Exception No. 38.

4. The Court charges you that the Statute of North Carolina, Revisal Section 2646, abolishing assumption of risk as defense to an action brought against a railroad company by one of its employees, has no application in this case, and if you find that the plaintiff assumed the risk of injury from the explosion of the water glass, you will answer the second issue "Yes."

The Court refused to give this instruction. Defendant excepts.

Exception No. 39.

5. If you find by a preponderance of the evidence that at the time of his alleged injury the plaintiff was employed by an interstate carrier engaged in interstate commerce, the Court charges you that this case will be tried under the provisions of the Federal Employer's Liability Act enacted by Congress at the session of Congress of 1908.

This instruction was given as appears in the charge as modified.

6. The right of the plaintiff to recover damages in this action is to be determined by the provisions of the Federal Employer's Liability Act enacted by Congress at the session of 1908, and the Court charges you that if you find by a preponderance of evidence
83 that the water glass on the engine on which plaintiff was employed was not provided with a guard glass and the condition of the glass was open and obvious and was fully known to the plaintiff and he continued to use such water glass with such knowledge and without objection, and that he knew the risk incident thereto, then the Court charges you that the plaintiff voluntarily assumed the risk incident to such use, and you will answer the second issue "Yes."

The Court gave this instruction as applicable to the issue of contributory negligence and instead of the words "then the Court charges you that the plaintiff voluntarily assumed the risk incident to such use and you will answer the second issue "Yes," used the words, "then the Court charges you that the plaintiff was guilty of contributory negligence, and you will answer the third issue "Yes."

To the refusal to give this instruction as requested and at the modification, defendant excepts.

Exception No. 40.

8. If you answer the first issue "Yes," and the second issue "No," and if you find by the greater weight of the evidence that the plaintiff knew of the condition of the water glass on the defendant's engine, and knew the risk incident to its use in that condition and continued to use such glass, and you find that a man of ordinary

prudence would not have used it, then the Court charges you that the plaintiff was guilty of contributory negligence, and you will answer the third issue "Yes."

9. If you answer the first issue "Yes," and the second issue "No," and if you find by the greater weight of the evidence that the plaintiff knew of the condition of the water glass on the engine, and knew that it was dangerous to use it in that condition, and that he could have shut off the glass and operated his engine with safety by using the gauge cocks on the said engine, and that the plaintiff,
84 with such knowledge, failed to shut off glass and use the gauge cocks, then the Court charges you that the plaintiff was guilty of contributory negligence, and you will answer the third issue "Yes."

10. If you find by the greater weight of the evidence that the water glass was defective, and that the plaintiff knew of the condition of the water glass on the engine, and the danger incident to its use, and that there was open to him a safe way of operating the said engine by using the gauge cocks, and that he voluntarily used the water glass in operating the engine, the Court charges you that the plaintiff assumed the risk of injury from the use of the water glass, and you will answer the second issue "Yes."

The Court refused to give this instruction, and the defendant excepts.

Exception No. 41.

12. If you answer the first issue "Yes," then the Court charges you that if you find by the preponderance of the evidence that the plaintiff knew of the condition of the water glass on the engine and that he could have shut off the glass and operated his engine with safety by using the gauge cocks on the said engine, and that the plaintiff, with such knowledge, failed to shut off the glass and use the gauge cocks, then the Court charges you that the plaintiff assumed the risk of injury, and you will answer the second issue "Yes."

The Court refused to give this instruction, and defendant excepts.

Exception No. 42.

13. If you answer the first issue "Yes," then the Court charges you that if you find by a preponderance of the evidence that the absence of the guard glass and water gauge was open and obvious and was fully known to the plaintiff, and he continued to use the said glass with such knowledge, and that the plaintiff reported the defect and was given a promise to repair, and you further
85 find that the plaintiff knew and appreciated the danger incident thereto, and that the danger was so obvious that a man of ordinary prudence would not have continued to use the gauge without the guard glass, then the Court charges you that the

plaintiff assumed the risk, and you will answer the second issue "Yes."

The Court gave this instruction.

(Signed) J. C. BIGGS,
(Signed) CHAS. U. HARRIS,
(Signed) MURRAY ALLEN,
Defendant's Attorneys.

Judge's Charge.

His Honor charged the jury as follows:

The plaintiff, gentlemen of the jury, has brought his action to recover damages, which he alleges he received while in the employ of the defendant company, and that he received such injuries because of the negligence of the defendant company. The burden is upon the plaintiff to prove to you by the greater weight of the evidence that he was injured, and that his injury was caused by the negligence of the defendant company. This action is brought under a statute of the United States commonly known as the Employer's Liability Act. The plaintiff had a right to select his own Court, and to select how he would bring suit. He might sue either in a State Court or Court of the United States. (When he comes into Court and says that the defendant is liable to him for injuries which he has received by reason of his position with the defendant because of the negligence of the defendant, and claims that his rights to recover are provided by a statute of the United States, then the plaintiff elected to rely upon his rights to recover as governed by the law, as enacted by Congress; still, however, it does not change the burden of proof on the plaintiff to show that the defendant is responsible through its negligence for the injuries which he alleges he has received.)

To the charge in parentheses defendant excepts.

Exception No. 43.

86 (It is the duty of the defendant to provide a reasonably safe place for the plaintiff to work, and to furnish him with reasonably safe appliances with which to do his work.)

To the charge in parentheses defendant excepts.

Exception No. 44.

It is admitted that he was an engineer in the defendant's employment, and that he was an engineer on a train engaged in interstate commerce. The other allegations in the complaint are denied, that is, it is denied that he was injured at all; and defendant says that if he was injured, it was because of his own negligence, and not that of the defendant company.

Defendant insists that it furnished him a reasonably safe place to work, and reasonably safe appliances. The plaintiff says that the place at which he was put to work was not safe, because of the fact that the water gauge, glass water gauge, had no guard or shield to it,

and that the guard or shield was a safety appliance in common use, and approved for the purpose of making his position as engineer a safe position. (It is the duty of the defendant to furnish the plaintiff with such reasonably safe appliances as are approved and in general use for that class of work, and if the defendant furnished him a glass water gauge, without safety appliances, and the safety appliances was in general use for that kind of gauge, and was wanting at the time the defendant gave him his engine, and was not supplied while he was operating the engine, then he did not have a reasonable safe place to work, and if you so find from the evidence, by its greater weight, and you should further find from the evidence by its greater weight that he was injured while operating his engine with the safety shield or guard absent, and that that was the proximate cause of his injury, it would be your duty to answer the first issue "Yes.")

To the charge in parentheses defendant excepts.

Exception No. 45.

87 If you fail to so find, it would be your duty to so answer it "No," and I desire to say now, before I undertake to set out the contentions, as I understand them to be between the parties, to tell you that it is your duty where there is a conflict of the evidence to reconcile the testimony, if you can consistently do so with the truth, and if you cannot consistently reconcile it, then you must decide which is true and which is false. You have the opportunity to judge of the manner and demeanor of the witnesses upon the stand, and the opportunity to judge of their purposes to speak the truth and their ability to do so, that is, the knowledge they have about the matters about which they testified.

(Where testimony is offered or contradictory statements are made—in other words, testimony is offered to show that the witness on the stand has heretofore made a statement different from the one made at the present time, the statement heretofore is not substantive proof if you find it was made but it is offered for the purpose of discrediting the witness upon the supposition that if a witness makes one statement here on the witness stand and has made another differing from it, that the testimony is not so reliable which he gives the Court and jury. It is also competent to offer what is known as corroborative testimony, that is, the witness has made the same or a similar statement at another time, not that you can rely upon the former statement as substantive proof, for it is argued that having made the statement on different occasions as that to which he testifies in Court, that it tends to give more credit to the testimony which he gives here.)

To the charge in parentheses defendant excepts.

Exception No. 46.

You will bear these rules in mind when you come to consider the various phases of this case, and the testimony bearing on it.

The plaintiff contends that he received his engine, and
88 that when he went out with it, it lacked this shield or guard for glass water gauge. The defendant contends that it did

not. The plaintiff insists that he has offered you evidence from which you ought to find that this engine was imperfectly equipped on the morning when he first took it out on the first trip; that it was furnished to him without this guard, and he insists that you ought to so find from the evidence.

The defendant on the other hand contends that it has offered evidence which it insists you ought to believe, and it insists that you ought to find that the engine was properly equipped with a guard for glass water gauge when it was turned over to him that morning. (If you find from the evidence that it was turned over to him without the guard, and if you further find from the evidence that the guard was a proper safety provision for the use of that gauge, and that it was unsafe without it, then the defendant did not furnish him a safe place and a safe appliance to do his work, and if it remained in that condition, it was continuing negligence on the part of the defendant, and if he was injured in consequence thereof, if you so find by the greater weight of the evidence, you should answer the first issue "Yes.")

To the charge in parentheses defendant excepts.

Exception No. 47.

But if you should find from the evidence that it was furnished to him when it was first turned over to him in a reasonably safe condition, that is, with the guard shield on the glass water gauge, then it did furnish him at the start with a safe appliance, that being the only complaint made in this case. But the evidence tends to show that he made three trips, and on the last trip he alleges he was injured. If it did not furnish him with a safe and proper guard for the glass water gauge, and if he had knowledge of it and continued to use it without notifying the defendant, or the agent or servants of the defendant, whose duty it was to supply the guard, then he was not injured by the negligence of the defendant, but by his
89 own negligence, because if a servant is entrusted with a piece of machinery that is in proper condition and proper safety, and he has the sole charge of it, he cannot be heard to complain that he was not furnished a safe appliance, or safe place in which to work, unless when he finds it unsafe he gives notice to his master or to the employer so that the employer may have knowledge of the defect and may take such steps as are necessary to remedy it.

That brings you to another question which is raised by the contentions of the parties, upon which they have offered evidence. The plaintiff contends that when he returned from that trip, and he offered you evidence which he insists you ought to believe, and from which he insists that you ought to find that he went to the roundhouse foreman and told him of the condition of the water gauge and the absence of the shield or guard and asked for its supply. He contends further that he was told by the foreman that he did not have the glass guard; that it was at Portsmouth, and he would send and get one, and to go on and use it. The defendant on the other hand contends that he did not make that statement. The plaintiff contends that in addition to notifying the foreman, that he went to another place in order to see if he couldn't secure it

and have it made himself. He says he has offered you evidence from which you ought to find that he went to a place where they had plate glass and asked the glass-cutter to make it, in order to make it safe. He argues to you that you ought to find not only that he notified the foreman of the roundhouse and was assured that he would have the guard glass by sending to Portsmouth for it, but that he, himself, did what he could to make it safe. The defendant denies that. (If you should find from the evidence that he gave notice when he came back to the foreman of the roundhouse, the place where it was his duty to make known the absence of the guard glass, and was then told that there was none on hand and to go on and use it, and he went on with that engine in that condition
90 and used it, and in consequence of using the engine with the glass water gauge in that condition he received his injury, then at the time he received the injury he was not in a safe place to work, and if he was injured in consequence thereof, and if you should so find from the evidence by the greater weight you should answer the first issue, "Yes.")

To the charge in parentheses defendant excepts.

Exception No. 48.

But if it was furnished to him, and if you should so find from the evidence, in a safe condition, with the guard glass in place and it became absent and he kept its absence to himself, and did not give any information about it, but continued to use it in that condition until he was hurt it would not be negligence on the part of the defendant, and you should answer the first issue, "No." If you answer the first issue "No," you need not answer the other issues, but if you answer the first issue "Yes," it becomes your duty to answer the second issue: "If so, did the plaintiff assume the risk of injury as alleged in the answer?"

As I told you before, plaintiff has brought this suit under the United States statute, and where Congress enacts a law, within the limits of its power, that law should be enforced uniformly throughout the entire United States. (If it is in conflict with the State law, the State law is superseded, but where there is no conflict expressed by the statute of the United States, then the rule of the State prevails.)

To the charge in parentheses defendant excepts.

Exception No. 49.

And in this act under which this suit is brought, it is provided that any action brought against any common carrier under and by virtue of any of the provisions of this act to recover damages for injuries to or death of any of its employees, such employee shall not be held to have assumed the risk of his employment in
91 any case where the violation by such carrier of any statute enacted for the safety of employees contributed to the injury or death of such employees. (There has been no statute provided as applies to this glass water gauge which has been called to the attention of the Court, so that leaves it open to the rights which the

plaintiff might have under the law of this State, and the question of assumed risk, as has been argued by one, if not more, of counsel, grows out of the contractual relations between plaintiff and defendant.)

To the charge in parentheses defendant excepts.

Exception No. 50.

(A man assumes the risk, when he takes employment, incident to the class of work which he has to perform.)

To the charge in parentheses defendant excepts.

Exception No. 51.

Some classes of work are more dangerous than others. (The position of a locomotive engineer might well be regarded as more hazardous than other employments, therefore he assumes the risk of that character of employment, but he has the right when he enters into employment of that class of work to assume that his employer has done what the law requires it to do in providing him a reasonably safe place to work, with reasonably safe appliances with which to do his work, consistent with the character of the work which is to be performed.)

To the charge in parentheses defendant excepts.

Exception No. 52.

(He does not assume the risk incident to the negligence of his employer in providing machinery and appliances with which he has to work.)

To the charge in parentheses defendant excepts.

Exception No. 53.

92 (On the other hand the employer has the right to assume that his employee will go about the work in a reasonably safe way, and give due regard to the machinery and appliances which are in his hands and under his control, and if you should find from the evidence, by its greater weight, because the burden in this instance is on the defendant, that the plaintiff knew of the absence of the guard or shield to the water gauge and failed to give notice to the defendant or to the agent whose duty it was to furnish the water gauge and appliance, and he continued to use it without giving that notice, it being furnished to him in a safe condition, then he assumed the risk incident to his work in the engine with the glass water gauge in that condition, although he might have handled his engine in every other respect with perfect care.)

To the charge in parentheses defendant excepts.

Exception No. 54.

(But if you find that he gave notice to the foreman of the roundhouse, and if you should find that the use of the water gauge was not so obviously dangerous that a reasonably prudent man, careful of

himself not to get hurt while he was about his work and went on and used it, he would not assume the risk, but if the danger was so apparent that a reasonably prudent man, careful of himself not to receive injury, would see that he was in imminent danger and would observe by the use of it that he was endangering himself by going on and working with it, that there was greater danger of getting hurt than otherwise, and he continued to work with it, he would be assuming the risk and responsibility, and it would be your duty to answer that issue "Yes."

To the charge in parentheses defendant excepts.

Exception No. 55.

If it was received in good condition and he failed to give notice, and if he did work with it in its present condition, without
93 the shield or guard, he then assumed the risk. How was that? It is a question of evidence for you. Did he give the notice? Did he assume the risk by failing to give notice, keeping the knowledge of the absence of the guard glass within his own breast? You have heard the testimony on both sides. The plaintiff contends that it was dangerous, and that it was not reasonably safe, because the very safety which experience found necessary was to have that shield or guard, one which was provided for that class of gauge, which would make it safe. Therefore, he insists that it was dangerous in not being provided with a shield. He insists that it was not so obviously dangerous that the accident of these glass tubes bursting did not occur so frequently but what a reasonably prudent man might go on with the work without realizing that he was likely to be hurt, or more likely to be hurt than not. On the other hand defendant contends that if he did give notice and continued to run on his own judgment, he assumed the risk; that if he did give the notice he should have known that it was so obviously dangerous that he should have declined to use it. And there is another rule which is insisted upon by the plaintiff and the defendant, and in which they conflict in their views. The defendant contends that the engine was not only supplied with the water gauge, but that there was another water gauge provided and by that the engine could be safely run. (Defendant says that if you should find the glass was unsafe; that there was a safe way provided by the other water gauge, and the defendant insists that a reasonably prudent man would have seen the absence of this shield, and that it was his duty for his own safety to shut off the glass gauge and use the other one, and that in failing to do so he took the risk and assumed the responsibility and risk in continuing the use of the glass gauge without the shield.)

To the charge in parentheses defendant excepts.

Exception No. 56.

94 (And the same rule applies if the use of the glass without the shield was not so obviously dangerous as to cause a reasonably prudent man to stop the use of it, his going on and using it, of itself, would not be assuming the risk in the use of it.)

To the charge in parentheses defendant excepts.

Exception No. 57.

(If it was so obviously dangerous that a reasonably prudent man would not use it, and he continued to use it instead of using the other, he would assume the risk.)

To the charge in parentheses defendant excepts.

Exception No. 58.

If you answer the first issue "Yes" and the second issue "Yes," that he assumed the risk, you need not answer the others, because he could not recover, but if you answer the first issue "Yes" and the second issue "No," then it becomes your duty to answer the third issue: "If so, did the plaintiff by his own negligence contribute to his injury as alleged in the answer?" (That is governed largely by the same rules as applied to the question of assumption of risk. Did he continue to use the glass gauge when it was obviously dangerous that a reasonably prudent man careful of himself would not do it? Was the danger so apparent that a reasonably prudent man would cease to use that and use the other gauge? If so, it would be your duty to answer the third issue "Yes.")

To the charge in parentheses defendant excepts.

Exception No. 59.

(But if the danger was not so obvious that a reasonably prudent man, careful of himself would not realize the danger of using the water glass, and he continued to use it, he would not be guilty of contributory negligence.)

To the charge in parentheses defendant excepts.

Exception No. 60.

95 4. "What damage, if any, is the plaintiff entitled to recover?" (If you answer the first issue "Yes" and the second issue "No," and the third issue "No" or "Yes" either, because under this law, if the defendant was guilty of negligence the plaintiff would be entitled to recover, notwithstanding the plaintiff was guilty of contributory negligence.)

To the charge in parentheses defendant excepts.

Exception No. 61.

(But if you should answer the third issue "Yes," that plaintiff was guilty of contributory negligence, then the defendant would be entitled to have a set off against any damages which he otherwise might recover, and it would be your duty to estimate what that would be. But if you answer it "No," then you give him the full measure of his injuries.)

To the charge in parentheses defendant excepts.

Exception No. 62.

(If you come to the question of damages, it is your duty in assessing damages to give the plaintiff a just compensation for the injury

which he has received to compensate him for the physical and mental pain and suffering occasioned by the injury, if any, the loss of time, if any, resulting from injury, his lessened capacity, if any, to earn a livelihood, the probable extent and duration of his injury, its consequence upon his earning capacity and suffering, whether his suffering is to continue or not; and in one sum you will estimate his damages in dollars and cents, from which you will deduct, if you find he is guilty of contributory negligence, such an amount as in your judgment should be deducted on that account from his actual damages.)

To the charge in parentheses defendant excepts.

Exception No. 63.

(It is the duty of the defendant under this act to furnish the plaintiff safe, sound, and suitable machinery, such as was
96 reasonably safe; if the jury should find from the evidence that the defendant negligently furnished plaintiff an unsafe and unsound water glass, as described in the complaint, and the plaintiff was injured on account of such negligent failure to furnish such safe and sound water glass, you will answer the first issue "Yes," provided you find that he was injured and that the failure to furnish this safe water glass was the proximate cause of the injury.)

To the charge in parentheses defendant excepts.

Exception No. 64.

(It is a duty that the master owes his servants to furnish reasonably safe implements and machinery for the use of his servants while in his employ, and he cannot absolve himself from this duty. If the jury should find from the evidence that the defendant failed to furnish the water glass to the plaintiff, as it was his duty to do in the operation of his engine and in consequence of which, if the jury should find from the evidence that the plaintiff was injured by the negligent construction and provision of the water glass, as alleged in the complaint, you should answer the first issue "Yes," but if the jury should find from the evidence that the water glass furnished by the defendant was safe and sound, and such as was in general use, and that the injury of the plaintiff was caused by his own negligent use thereof, you should answer the first issue "No," but if you should find from the evidence that the cause of the injury was in the construction and provision of the water glass and also in the negligent use of the same by the plaintiff, then you should answer the first issue "Yes," and shall diminish the amount of damages so found by them in proportion to the amount of negligence which, under the evidence, is attributable to the plaintiff.)

To the charge in parentheses defendant excepts.

Exception No. 65.

97 The right of the plaintiff to recover damages in this action is to be determined by the provisions of the Federal Employers' Liability Act enacted at the session of Congress of 1908. (If

you find by the preponderance of the evidence that the water glass by which plaintiff was injured was not provided with a guard glass and the condition of the water glass was open and obvious and was fully known to the plaintiff, and he continued to use such water glass with such knowledge and without objecting, and knew the risk incident thereto, then the Court charges you that the plaintiff was guilty of contributory negligence, and you should answer the third issue "Yes.")

To the charge in parentheses defendant excepts.

Exception No. 66.

If you answer the first issue "Yes," then the Court charges you that if you find by the preponderance of the evidence that the absence of the guard glass and water gauge was open and obvious, and was fully known to the plaintiff, and he continued to use the said glass with such knowledge, and that the plaintiff reported the defect and was given a promise to repair, and you further find that the plaintiff knew and appreciated the danger incident thereto, and that the danger was so obvious that a man of ordinary prudence would not have continued to use the gauge without the guard glass, then the Court charges you that the plaintiff assumed the risk, and you will answer the second issue "Yes."

The issues are: Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint?

If so, did the plaintiff assume the risk of injury, as alleged in the answer?

If so, did the plaintiff by his own negligence, contribute to his injury, as alleged in the answer?

What damages, if any, is plaintiff entitled to recover?

You may take the case.

98 The jury for their verdict answered the issues as follows:

1. Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint?

Answer: "Yes."

2. If so, did the plaintiff assume the risk of injury, as alleged in the answer?

Answer: "No."

3. Did the plaintiff, by his own negligence contribute to his injury, as alleged in the answer?

Answer: "Yes."

4. What damage, if any, is the plaintiff entitled to recover?

Answer: $7,500.00.

Upon the coming in of the verdict defendant moved for judgment non obstante veredicto. Motion overruled and defendant excepts.

Exception No. 67.

Defendant moves to set the verdict aside because the amount and defendant excepts.

Exception No. 68.

Defendant moved to set the verdict aside as against the weight of the evidence. Motion overruled and defendant excepts.

Exception No. 69.

Defendant moves to set the verdict aside because the amount awarded is excessive. Motion overruled and defendant excepts.

Exception No. 70.

The defendant moved for a new trial for errors occurring during the trial in the admission and exclusion of evidence, and in the Court's charge to the jury, and in the Court's refusal to give
99 defendant's special requests for instruction. Motion overruled, and defendant excepts.

Exception No. 71.

The Court signed judgment as appears in the record. The defendant excepts.

Exception No. 72.

The defendant in open Court appealed to the Supreme Court. Notice waived. Appeal bond fixed at fifty dollars. Defendant allowed thirty days from the last day of term in which to prepare and serve case on appeal, and plaintiff allowed thirty days thereafter in which to prepare and serve counter-case or exceptions.

Assignments of Error.

The defendant, Seaboard Air Line Railway, appellant, groups its exceptions and assigns the following errors:

1. For that the Court permitted the plaintiff J. T. Horton, over the defendant's objection, to testify that he told Mr. Matthews, the day roundhouse foreman at Johnson Street, that this guard glass was gone and asked him if he had one, and he said that they did not keep them in stock here, that they were made in Portsmouth, and he would have to send to Portsmouth to get one, to run her like she was. He said he would send to Portsmouth and get me one. This is defendant's exception No. 1.

2. For that the Court permitted the plaintiff to testify that after Mr. Matthews had told him that he did not have any guard glass, that he went to the Baker-Thompson Lumber Company, and for that his Honor refused upon defendant's motion to strike out this evidence. This is defendant's exception No. 2.

3. For that the Court permitted the plaintiff to testify as follows: "I went to Mr. Charlie Murray, the glass cutter for the Baker-
100 Thompson Lumber Company, and told him I wanted him to make me a guard glass and gave him the measurements." This is defendant's exception No. 3.

4. For that the Court admitted over the defendant's objection the following evidence: "Q. Did you ever get that guard glass? A. No, sir." This is defendant's exception No. 4.

5. For that the Court refused to strike out the words: "It's no use" as used by the plaintiff in answer to the following question: "Q. Have you applied for any job to run a locomotive engine?" A. "No, sir; it's no use." Defendant objects to the language "it's no use," and asked the Court to strike it out. This is defendant's exception No. 5.

6. For that the Court admitted the following evidence over the defendant's objection: "Q. State if you have any mental suffering

on account of your injury?" A. "Yes; I worry day and night because I cannot follow my chosen occupation; I can't make half the money I did make." This is defendant's exception No. 6.

7. For that the Court refused to strike out the witness' answer to the question shown in assignment of error No. 6 upon defendant's motion to strike it out. This is defendant's exception No. 7.

8. For that the Court admitted the following evidence over the defendant's objection: "State what the duties of those inspectors were, if you know." A. "It was their duty to inspect the engine from the ground up; they make out a report on each engine, that would include an inspection of the water glass." This is defendant's exception No. 8.

9. That the Court refused, upon objection by the plaintiff, to permit the plaintiff to read to the jury rule 668 from rule book of the defendant company governing its employees, as he was requested to do by the defendant. This is defendant's exception No. 9.

10. For that in the course of the examination of the plaintiff, with respect to his testimony at the former trial of this
101 case, the Court sustained the plaintiff's objection to the following question: "Did you find anything in there about Matthews telling you about going ahead with the engine? State if you can find it anywhere in there." This is defendant's exception No. 10.

11. For that the Court permitted the plaintiff over defendant's objection to testify in regard to the circumstances under which he signed the release for injury received in 1903, as follows: "I started to say Mr. Baldwin came up to me in front of King-Crowell Drug Store." This is defendant's exception No. 11.

12. For that the Court permitted the plaintiff to testify over defendant's objection and refused to strike out testimony as follows: "He (Baldwin) was detective for the Seaboard, and said he was going to pay me for my time." I said I did not want pay. He said that he had been to see the doctor and he said there was nothing the matter with my eye, that it was just irritated. I lost four days, it amounted to $8 to $10, probably $15. I signed it and in about thirty days they gave me a voucher for about $8 or $10, certainly not over $15. This is defendant's exception No. 12.

13. For that the Court refused over defendant's objection to strike out the following words used by plaintiff in answer to the question as to what effort he had made to get employment with any other road: "It is no use, just a waste of time and money to go and see about it." This is defendant's exception No. 13.

14. For that the Court sustained the plaintiff's objection when defendant asked the witness M. C. Horton, an expert offered by the plaintiff, if a very large number of people did not have astigmatism. This is defendant's exception No. 14.

15. For that the Court refused to sustain the defendant's motion for judgment of nonsuit, and to dismiss the action made at the conclusion of plaintiff's evidence. This is defendant's exception No. 15.

16. For that the Court permitted the plaintiff to ask the
102 defendant's witness W. S. Benton, the following question: "How much do you get paid to come here and testify?" This is defendant's exception No. 16.

17. For that the Court sustained the plaintiff's objection to the following question asked the defendant's witness P. M. Matthews, roundhouse foreman for the defendant: "Q. If this defect had been reported on the work report by engineman Horton, the absence of the guard glass, what would you have done?" This is defendant's exception No. 17.

18. For that the Court sustained the plaintiff's objection to the following question asked the defendant's witness Lewis Archer, general foreman: "Q. As soon as you ascertained that this water glass was broken and the guard glass missing, what did you do with regard to supplying the guard glass for the water gauge on that engine?" This is defendant's exception No. 18.

19. For that the Court sustained the plaintiff's objection to the following question asked the defendant's witness Lewis Archer, general foreman: "Q. Did you see any of this glass cut on the evening of August 4th, 1910?" This is defendant's exception No. 19.

20. For that the Court admitted the following testimony of plaintiff's witness Charles H. Murray, over defendant's objection, stating to the jury that it was competent as corroborative testimony: "Q. State whether or not he (Horton) said anything to you at any time, if so, when, in respect to cutting glass for him for the water gauge?" A. "He came to me about the 1st of August, 1910, and told me he would like to get me to cut him a water glass, he had heard I had been cutting some." This is defendant's exception No. 20.

21. For that the Court permitted the plaintiff's witness Charles Murray, over defendant's objection to testify as follows: "Q. Who had you been cutting them for?" "A. For two or three engineers on the Seaboard First division." This is defendant's exception No. 21.

22. For that the Court permitted the plaintiff's witness
103 Charles Murray, over the defendant's objection to testify as follows, stating to the jury that the evidence was competent as corroborative testimony: "Q. Why did he state that he wanted you to cut him one?" "A. He said he did not have any on his engine, and that there were none in the storehouse and he wanted me to fix it. He said they didn't have any in the storehouse." This is defendant's exception No. 22.

23. For that the Court permitted the plaintiff's witness J. A. Massey, over the defendant's objection to testify as follows: "Q. I wish you would state to the jury if you know what the custom and practice was in respect to engineers obtaining supplies for their locomotives?" "A. It was customary for engineers when they wanted to get supplies out of the store-room, to go to the general foreman and get a requisition for whatever they wanted." This is defendant's exception No. 23.

24. For that the Court permitted the plaintiff's witness E. C. Horton, to testify in regard to the condition of the water glass on engine 752 which was used by the plaintiff, as follows, over defendant's objection: "How was it on the trip just after the injury?" "A. It had a little thin glass in that shield there, it was very greasy from machinists handling it so that I couldn't see the water tube to locate the water level in boiler, and I taken it out and cleaned it.

It was so thin it shook this way (indicating.) When I got to Cary I cut wedges and stuck in here to steady the glass to keep it from jarring back and forth in the grooves of the shield. When I discovered that the glass was out of here when I made this trip, I went to the foreman and told him that there was no shield glass." This is defendant's exception No. 24.

25. For that the Court refused upon defendant's motion to strike out the answer of the witness E. C. Horton, to question shown in assignment of error number 25. This is defendant's exception No. 25.

26. For that the Court permitted the plaintiff's witness
104 E. C. Horton, over the defendant's objection to testify as follows: "Q. What was the custom and practice down there when a shield to the guard glass or tube or any part of the engine was missing in the cab?" "A. The inner tube—there would be a machinist's report, but as to that shield glass there, I could get a requisition and go to the store-room and get it and drop it down. Anybody could drop one just as you are doing that now. I would apply to the foreman for requisitions verbally." This is defendant's exception No. 26.

27. For that the Court permitted the plaintiff's witness E. C. Horton, over the defendant's objection, to testify as follows: 'Q. State if it was the practice of engineers down there to run their engines without the guard glass at all?" "A. As to that special kind, I only run this engine with that, but the old shields that we did run without any guard glass on." This is defendant's exception No. 27.

28. For that the Court refused upon defendant's motion, to strike out the witness' answer to question shown in assignment of error number 28. This is defendant's exception No. 28.

29. For that the Court permitted the plaintiff's witness E. C. Horton, over defendant's objection, to testify as follows: "Q. State what was the duty of the engineer if he found the guard glass gone, whether or not it was his duty to shut off the guard glass and run with the gauge cocks?" "A. I never did do it." This is defendant's exception No. 29.

30. For that the Court refused upon defendant's motion to strike out the answer of the witness to the question shown in the assignment of error number 30. This is defendant's exception No. 30.

31. For that the Court permitted the plaintiff to introduce in evidence two bottles of liquid and a jar of salve with eye dropper, the labels on bottles showing numbers 101954 and 104435. This is defendant's exception No. 31.

32. For that the Court admitted in evidence, stating to the jury that it was admitted as corroborative evidence only, over the
105 defendant's objection, a paper showing examination of plaintiff by Dr. A. W. Goodwin for the purpose of securing insurance, the paper containing the statement that he examined plaintiff on November 30, 1905, and that he had two good eyes. This is defendant's exception No. 32.

33. For that the Court permitted the plaintiff's witness Dr. A. W. Goodwin, to testify as follows over defendant's objection: "Q. If the jury should find from the evidence that Horton has got 20-70 sight

on one eye and normal in the other, would he, in your opinion, be suited for a railroad engineer's duties?" "A. I shouldn't say so. That is my general opinion." This is defendant's exception No. 33.

34. For that the Court permitted the plaintiff's witness Dr. A. W. Goodwin, to testify as follows, over defendant's objection: "In your opinion could a man with an eye like that pass the examination that you put to this man?" "A. I don't think he could have read the print I showed him." This is defendant's exception No. 34.

35. For that the Court refused the defendant's motion for judgment of nonsuit under the Hinsdale Act, and to dismiss the action at the conclusion of all the evidence and overruled the defendant's motion. This is defendant's exception No. 35.

36. For tha tthe Court refused to give the defendant's request for special instructions, as follows: "The Court charges you that if you believe the evidence the plaintiff was not injured by any negligence on the part of the defendant, and you will answer the first issue "No." This is defendant's exception No. 36.

37. For that the Court refused to give the defendant's request for special instructions to the jury, as follows: "The Court charges you that if you believe the evidence the plaintiff assumed the risk of injury from the explosion of the water glass, and you will answer the second issue "Yes." This is defendant's exception No. 37.

38. For that the Court refused to give the defendant's request for special instructions to the jury, as follows: "If you do
106 not answer the second issue 'Yes,' then the Court charges you that if you believe the evidence the plaintiff, by his own negligence, contributed to his injury, and you will answer the third issue 'Yes.'" This is defendant's exception No. 38.

39. For that the Court refused to give the defendant's request for special instructions to the jury as follows: "The Court charges you that the statute of North Carolina, Revisal Section 2646, abolishing assumption of risk as defense to an action brought against a railroad company, by one of its employees, has no application in this case, and if you find that the plaintiff assumed the risk of injury from the explosion of the water glass, then you will answer the second *second* issue "Yes." This is defendant's exception No. 39.

40. For that the defendant requested the Court to instruct the jury as follows: "The right of the plaintiff to recover damages in this action is to be determined by the provisions of the Federal Employer's Liability Act enacted by Congress at the session of 1908, and the Court charges you that if you find by a preponderance of evidence that the water glass on the engine on which plaintiff was employed was not provided with a guard glass and the condition of the glass was open and obvious and was fully known to the plaintiff and he continued to use such water glass with such knowledge and without objection, and that he knew the risk incident thereto, then the Court charges you that the plaintiff voluntarily assumed the risk incident to such use, and you will answer the second issue "Yes."

The Court gave this instruction as applicable to the issue of contributory negligence, and instead of the words "then the Court charges you that the plaintiff voluntarily assumed the risk incident to such use, and you will answer the second issue "Yes," used the

words "then the Court charges you that the plaintiff is guilty of contributory negligence, and you will answer the third issue "Yes."

To the refusal to give this instruction as requested, and
107 the modification, the defendant excepts. Exception No. 40.

41. For that the Court refused to give the defendant's request for special instructions to the jury as follows: "If you find by the greater weight of the evidence that the water glass was defective, and that the plaintiff knew of the condition of the water glass on the engine and the danger incident to its use, and that there was open to him a safe way of operating the said engine by using the gauge cocks, and that he voluntarily used the water glass in operating the engine, the Court charges you that the plaintiff assumed the risk of injury from the use of the water glass, and you will answer the second issue 'Yes.'" This is defendant's exception No. 41.

42. For that the Court refused to give the defendant's request for special instructions to the jury as follows: "If you answer the first issue 'Yes,' then the Court charges you that if you find by the preponderance of the evidence that the plaintiff knew of the condition of the water glass on the engine, and that he could have shut off the glass and operated his engine with safety by using the gauge cocks on the said engine, and that the plaintiff with such knowledge failed to shut off the glass and use the gauge cocks, then the Court charges you that the plaintiff assumed the risk of injury, and you will answer the second issue 'Yes.'" This is defendant's exception No. 42.

43. For that the Court instructed the jury as follows: "When he comes into court and says that the defendant is liable to him for injuries which he has received by reason of his position with the defendant because of the negligence of the defendant, and claims that his rights to recover are provided by a statute of the United States, then the plaintiff elected to rely upon his right to recover as governed by the law as enacted by Congress; still, however, it does not change the burden of proof on the plaintiff to show that the defendant is responsible through its negligence for the injuries which he alleges he has received." This is defendant's exception No. 43.

44. For that the Court instructed the jury as follows: "It
108 is the duty of the defendant to provide a reasonably safe place for the plaintiff to work, and to furnish him with reasonably safe appliances with which to do his work." This is defendant's exception No. 44.

45. For that the Court instructed the jury as follows: "It is the duty of the defendant to furnish the plaintiff with such reasonably safe appliances as are approved and in general use for that class of work, and if the defendant furnished him a glass water gauge, without safety appliances, and the safety appliance was in general use for that kind of gauge, and was wanting at the time defendant gave him his engine, and was not supplied while he was operating the engine, then he did not have a reasonably safe place to work, and if you so find from the evidence by its greater weight that he was injured while operating his engine with the safety shield or guard absent, and that that was the proximate cause of his injury, it would

be your duty to answer the first issue 'Yes.'" This is defendant's exception No. 45.

46. For that the Court instructed the jury as follows: "Where testimony is offered or contradictory statements are made, in other words, testimony is offered to show that the witness on the stand has heretofore made a statement different from the one made at the present time, the statement heretofore is not substantive proof if you find it was made, but it is offered for the purpose of discrediting the witness upon the supposition that if a witness makes one statement here on the witness stand and has made another differing from it, that the testimony is not so reliable which he gives the Court and jury. It is also competent to offer what is known as corroborative testimony, that is, the witness has made the same or similar statement at another time, not that you can rely upon the former statement as substantive proof, for it is argued that having made the same statement on different occasions as that to which he testifies in court, that it tends to give more credit to the testimony which he gives here." This is defendant's exception No. 46.

47. For that the Court instructed the jury as follows: "If
109 you find from the evidence that it was turned over to him without the guard, and if you further find from the evidence that the guard was a proper safety provision for the use of that gauge, and that it was unsafe without it, then the defendant did not furnish him a safe place, and a safe appliance to do his work, and if it remained in that condition it was continuing negligence on the part of the defendant, and if he was injured in consequence thereof, if you should so find by the greater weight of the evidence you should answer the first issue 'Yes.'" This is defendant's exception No. 47.

48. For that the Court instructed the jury as follows: "If you should find from the evidence that he gave notice when he came back to the foreman of the roundhouse, the place where it was his duty to make known the absence of the guard glass, and was then told that there was none on hand, and to go on and use it, and he went on with that engine in that condition and used it and in consequence of using the engine with the glass water guage in that condition he received his injury, then at the time he received the injury he was not in a safe place to work, and if he was injured in consequence thereof, and if you should so find from the evidence by the greater weight, you should answer the first issue 'Yes.' This is defendant's exception No. 48.

49. For that the Court, referring to the act of Congress instructed the jury as follows: "If it is in conflict with the State law, the State law is superseded, but where there is no conflict expressed by the statute of the United States, then the rule of the State prevails." This is defendant's exception No. 49.

50. For that the Court instructed the jury as follows: "There has been no statute provided as applies to this glass water gauge which has been called to the attention of the Court, so that leaves it open to the rights which the plaintiff might have under the law of this State, and the question of assumed risk, as has been argued by one, if not

more of counsel, grows out of the contractual relations be-
110 tween plaintiff and defendant." This is defendant's exception No. 50.

51. For that the Court instructed the jury as follows: "A man assumes the risk, when he takes employment, incident to the class of work which he has to perform." This is defendant's exception No. 51.

52. For that the Court instructed the jury as follows: "The position of a locomotive engineer might well be regarded as more hazardous than other employments, therefore he assumes the risk of that character of employment, but he has the right when he enters into employment of that class of work to assume that his employer has done what the law requires it to do in providing him a reasonably safe place to work, with reasonably safe appliances with which to do his work, consistent with the character of the work which is to be performed." This is defendant's exception No. 52.

53. For that the Court instructed the jury as follows: "He does not assume the risk incident to the negligence of his employer in providing machinery and appliances with which he has to work." This is defendant's exception No. 53.

54. For that the Court instructed the jury as follows: "On the other hand the employer has the right to assume that his employee will go about the work in a reasonably safe way, and give due regard to the machinery and appliances which are in his hands and under his control, and if you should find from the evidence by its greater weight, because the burden in this instance is on the defendant, that the plaintiff knew of the absence of the guard or shield to the water gauge and failed to give notice to the defendant or to the agent whose duty it was to furnish the water gauge and appliance, and he continued to use it without giving that notice, it being furnished to him in a safe condition, then he assumed the risk incident to his work in the engine with the glass water gauge in that condition, although he might have handled his engine in every other respect with perfect care." This is defendant's exception No. 54.

55. For that the Court instructed the jury as follows: "But
111 if you find that he gave notice to the foreman of the roundhouse, and if you should find that the use of the water gauge was not so obviously dangerous that a reasonably prudent man careful of himself not to get hurt while he was about his work and went on and used it he would not assume the risk, but if the danger was so apparent that a reasonably prudent man, careful of himself not to receive injury would see that he was in imminent danger and would observe by the use of it that he was endangering himself by going on and working with it, that there was greater danger of getting hurt than otherwise, and he continued to work with it, he would be assuming the risk and responsibility, and it would be your duty to answer that issue 'Yes.'" This is defendant's exception No. 55.

56. For that the Court instructed the jury as follows: "Defendant says that if you should find the glass was unsafe, that there was a safe way provided by the other water gauge, and the defendant insists

that a reasonably prudent man would have seen the absence of this shield, and that it was his duty for his own safety to shut off the glass gauge and use the other one, and that in failing to do so he took the risk and assumed the responsibility and risk in continuing the use of the glass gauge without the shield." This is defendant's exception No. 56.

57. For that the Court instructed the jury as follows: "And the same rule applies if the use of the glass without the shield was not so obviously dangerous as to cause a reasonably prudent man to stop the use of it, his going on and using it, of itself, would not be assuming the risk in the use of it." This is defendant's exception No. 57.

58. For that the Court instructed the jury as follows: "If it was so obviously dangerous that a reasonably prudent man would not use it, and he continued to use it instead of using the other, he would assume the risk." This is defendant's exception No. 58.

59. For that the Court instructed the jury as follows on
112 the issue of contributory negligence: "That is governed largely by the same rules as applied to the question of assumption of risk. Did he continue to use the glass gauge when it was so obviously dangerous that a reasonably prudent man careful of himself would not do it? Was the danger so apparent that a reasonably prudent man would cease to use that and use the other gauge? If so, it would be your duty to answer the third issue 'Yes.'" This is defendant's exception No. 59.

60. For that the Court instructed the jury as follows: "But if the danger was not so obvious that a reasonably prudent man careful of himself would not realize the danger of using the water glass and he continued to use it, he would not be guilty of contributory negligence." This is defendant's exception No. 60.

61. For that the Court instructed the jury as follows: "If you answer the first issue 'Yes' and the second issue 'No,' and the third issue 'No' or 'Yes' either, because under this law if the defendant was guilty of negligence, the plaintiff would be entitled to recover notwithstanding the plaintiff was guilty of contributory negligence." This is defendant's exception No. 61.

62. For that the Court instructed the jury as follows: "But if you should answer the third issue 'Yes' that the plaintiff was guilty of contributory negligence, then the defendant would be entitled to have a set off against any damages which he otherwise might recover. But if you answer it 'No,' then give him the full measure of his injuries." This is defendant's exception No. 62.

63. For that the Court instructed the jury as follows: "If you come to the question of damages, it is your duty in assessing damages to give the plaintiff a just compensation for the injury which he has received to compensate him for the physical and mental pain and suffering occasioned by the injury, if any, the loss of time, if any, resulting from injury, his lessened capacity, if any, to
113 earn a livelihood, the probable extent and duration of his injury, its consequence upon his earning capacity and suffering, whether his suffering is to continue or not; and in one sum you

will estimate his damages in dollars and cents, from which you will deduct, if you find he is guilty of contributory negligence, such amount as in your judgment should be deducted on that account from his actual damages. This is defendant's exception No. 63.

64. For that the Court instructed the jury as follows: "It is the duty of the defendant under this act to furnish the plaintiff safe, sound and suitable machinery, such as was reasonably safe, if the jury should find from the evidence that the defendant negligently furnished plaintiff an unsafe and unsound water glass, as described in the complaint, and the plaintiff was injured on account of such negligent failure to furnish such safe and sound water glass, you will answer the first issue 'Yes,' provided you find that he was injured and that the failure to furnish this safe water glass was the proximate cause of the injury." This is defendant's exception No. 64.

65. For that the Court instructed the jury as follows: "It is a duty that the master owes his servants to furnish reasonably safe implements and machinery for the use of his servants while in his employ, and he cannot absolve himself from this duty. The jury should find from the evidence that the defendant failed to furnish the water glass to the plaintiff as it was his duty to do in the operation of his engine and in consequence of which, if the jury should find from the evidence that the plaintiff was injured by the negligent construction and provision of the water glass, as alleged in the complaint, you should answer the first issue 'Yes,' but if the jury should find from the evidence that the water glass furnished by the defendant was safe and sound and such as was in general use, and that the injury of the plaintiff was caused by his own negligent use thereof, you should answer the first issue 'No,' but if you should find
114 from the evidence that the cause of the injury was in the construction and provision of the water glass, and also in the negligent use of the same by the plaintiff, then you should answer the first issue 'Yes,' and shall diminish the amount of damages so found by them in proportion to the amount of negligence, which, under the evidence, is attributable to the plaintiff." This is defendant's exception No. 65.

66. For that the Court instructed the jury as follows: "If you find by the preponderance of the evidence that the water glass by which plaintiff was injured was not provided with a guard glass and the condition of the water glass was open and obvious, and was fully known to the plaintiff, and he continued to use such water glass with such knowledge and without objecting, and knew the risk incident thereto, then the Court charges you that the plaintiff was guilty of contributory negligence, and you will answer the third issue 'Yes.'" This is defendant's exception No. 66.

67. For that the Court refused defendant's motion for judgment non obstante veredicto. This is defendant's objection No. 67.

68. For that the Court refused defendant's motion for judgment on the verdict. This is defendant's exception No. 68.

69. For that the Court refused defendant's motion to set the verdict aside as against the weight of the evidence. This is defendant's exception No. 69.

70. For that the Court refused defendant's motion to set the verdict aside because the amount awarded is excessive. This is defendant's exception No. 70.

71. For that the Court refused defendant's motion for a new trial for errors occurring during the trial in the admission and exclusion of evidence and in the Court's charge to the jury and in the Court's refusal to give defendant's requests for instruction. This is defendant's exception No. 71.

115 72. For that the Court signed judgment as appears in the record. This is defendant's exception No. 72.

MURRAY ALLEN,
Defendant's Attorney.

The foregoing is tendered by the defendant as its statement of case on appeal.

MURRAY ALLEN,
Defendant's Attorney.

Service of the foregoing statement of case on appeal is hereby accepted, copy of same having been received.

This December 7th, 1912.

DOUGLASS, LYON & DOUGLASS,
Plaintiff's Attorneys.

The defendant having filed and served case on appeal to Supreme Court on December 7th, 1912, and the plaintiff having filed and served exceptions to said case on January 2d, 1913, and the case on appeal and exceptions having been duly forwarded to the Judge to settle the case on appeal, pending settlement of case on appeal by the Judge, the foregoing is agreed upon by plaintiff and defendant as case on appeal to the Supreme Court.

DOUGLASS, LYON & DOUGLASS,
Of Counsel for Plaintiff.

MURRAY ALLEN,
Attorney for Defendant.

Clerk's Certificate.

STATE OF NORTH CAROLINA,
Wake County:

I, Millard Mial, Clerk of the Superior Court of Wake County, North Carolina, do certify that the foregoing contains a full, true and correct transcript of the record in an action lately pending in said Court between James T. Horton, plaintiff, and Seaboard Air Line Railway, defendant.

116 In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at office in Raleigh, this — day of February, 1913.

(Signed) MILLARD MIAL,
Clerk Superior Court.

(Official Seal.)

117 *Docket Entries.*

Docketed March 3, 1913. Argued March 12, 1913.
Opinion by Allen, J. May 28, 1913. No Error, in which Clark, C. J. concurs. Brown, J. Files a dissenting opinion.
The opinions are as follows:

118 Supreme Court of North Carolina, February Term, 1913.

#221. Wake.

J. T. HORTON
v.
SEABOARD AIR LINE RAILROAD COMPANY, Appellant.

This is an action brought under the Federal Employers' Liability Act, to recover damages for injury to the plaintiff's eye, caused by the explosion of a water glass on a locomotive engine.

The plaintiff, at the time of the injury, had been employed by the defendant as engineer for a period of six years, and as fireman for three or four years prior to his promotion.

The engine, No. 752, which plaintiff was operating, was equipped with a patented water glass, called the Buckner Water Glass, which was so constructed that a thick guard glass was placed over the front of the water glass to protect the eyes of the engineer in the event the inner glas should explode. The engine was also quipped with an alternative method of determining the amount of water in the boiler by means of *guage* cocks.

The plaintiff was called on to take this engine July 27, 1910, and August 4, 1910, while engaged in shifting cars at Apex, N. C., the water glass exploded and injured his eye. Immediately after the explosion the fireman cut off the *guage* glass at top and bottom, and the engine was operated to Raleigh with the gauge cocks as the means of determining the amount of water in the boiler.

The guard glass referred to as part of the Buckner equipment is a thick piece of glass two or three inches wide and eight or nine inches long, with a thickness of a quarter or three-eights of an inch, according to plaintiff's testimony and is detached from the *guage*, being placed in slots arranged for the purpose of holding it. The Buckner *guage* is a brass tube, with an opening in front and containing a small glass tube.

The plaintiff testified that "the shield or guard glass is important as a protection to the engineer's eyes; that is all it is for." "I knew the shield was gone, and I knew it was put there for the
119 safety of anybody on the engine."

The plaintiff also testified that after taking out the engine on July 27th, 1910, he returned on July 28th, 1910, and then told the round-house foreman of the defendant, to whom reports of defects ought to have been made, that the shield or guard glass was gone and he wanted one, and that the foreman replied that they had

none in stock, to run the engine as it was, and he would send to Portsmouth and get him one; that he knew there was some danger in operating without a shield or guard glass, but that he was told by the foreman to go ahead without it, and if he had not done so, he would have lost his job. The foreman denied that any objection or complaint was made to him.

There was evidence by the defendant tending to prove that it was the duty of the plaintiff to shut off the water glass, when he discovered the absence of the shield or guard glass, and to run with the gauge cocks, and that this could be done without danger and successfully.

The defendant requested the following instruction on the issue as to assumption of risk, and excepted to the refusal to give them as requested:

"1. The Court charges you that if you believe — the evidence the plaintiff assumed the risks of the injury from the explosion of the water glass, *and* you will answer the second issue: 'Yes.'

2. The right of the plaintiff to recover damages in this action is to be determined by the provisions of the Federal Employers' Liability Act, enacted by Congress at the Session of 1908, and the Court charges you that if you find by a preponderance of evidence that the water glass on the engine on which plaintiff was employed was not provided with a guard glass and the condition of the glass was open and obvious and was fully known to the plaintiff and he continued to use such water glass with such knowledge and without objection, and that he knew the risk incident thereto, then the Court charges you that the plaintiff voluntarily assumed the risk
120 incident to such use, and you will answer the second issue, 'Yes.'

3. If you find by the greater weight of the evidence that the water glass was defective, and that the plaintiff knew of the condition of the water glass on the engine, and the danger incident to its use, and that there was open to him a safe way of operating the said engine by using the gauge cocks, and that he voluntarily used the water glass in operating the engine, the Court charges you that the plaintiff assumed the risk of injury from the use of the water glass, and you will answer the second issue, 'Yes.'

4. If you answer the first issue, 'Yes,' then the Court charges you that if you find by the preponderance of the evidence that the plaintiff knew of the condition of the water glass on the engine and that he could have shut off the glass and operated his engine with safety by using the gauge cocks on the said engine and that the plaintiff, with such knowledge, failed to shut off the glass and use the gauge cocks, then the Court charges you that the plaintiff assumed the risk of injury, and you will answer the second issue, 'Yes.'

5. If you answer the first issue 'Yes,' then the Court charges you that if you find by a preponderance of the evidence that the absence of the guard glass and water gauge was open and obvious and was fully known to the plaintiff and he continued to use the said glass with such knowledge, and that the plaintiff reported the defect and was given a promise to repair, and you further find that the plain-

tiff knew and appreciated the danger incident thereto, and that the danger was so obvious that a man of ordinary prudence would not have continued to use the gauge without the guard glass, then the Court charges you that the plaintiff assumed the risk, and you will answer the second issue 'Yes.'"

The jury returned the following verdict:

"1. Was the plaintiff injured by the negligence of the de-
121 fendant, as alleged in the complaint? Answer: Yes.

2. If so, did the plaintiff assume the risk of injury, as alleged in the answer? Answer: No.

3. Did the plaintiff by his own negligence contribute to his injury, as alleged in the answer? Answer: Yes.

4. What damages, if any, if the plaintiff entitled to recover? Answer: $7,500.00."

Judgment was entered upon the verdict, and the defendant excepted and appealed.

Douglass & Douglass, W. B. Snow, J. W. Bunn and R. N. Simms for plaintiff.

Murray Allen for defendant.

ALLEN, J.

This action is to recover damages under the Federal Employers' Liability Act, and the principal question raised by the appeal is as to the application of the doctrine of assumption of risk.

The Act abolishes contributory negligence as a defense, and instead introduces the doctrine of comparative negligence, and it has the following provision as to assumption of risk: "Sec. 4. That in any action brought against any common carrier under or by virtue of any of the provisions of this Act to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

It is contended by the defendant and may be conceded, that the term "any statute" in the section quoted means any Federal statute, and that the assumption of risk is to be applied by a construction of the whole statute and under the rules laid down by the Supreme Court of the United States.

Statutes should receive such a construction as will accord with the legislative intention, as gathered from the whole act (McKee
122 v. U. S., 164 U. S. 287), and when the act under consideration is so construed, it is at least debatable whether assumption of risk should be admitted as a defense in any action brought under its provisions. It says that contributory negligence on the part of the employee, (that is, negligence which proximately causes the injury, because no other negligence is contributory), "shall not bar a recovery," and it would appear to be incongruous to admit as a defense assumption of risk which is based upon the fiction that the employee has assented to assume the risk of the particular injury, and when the facts relied on to prove assumption

of risk generally enter into and are a part, but not all, of those necessary to sustain a plea of contributory negligence.

Mr. Justice Holmes considers the converse of this proposition in Schlemmer v. R. R., 205 U. S. p. 1, in discussing a statute which abolished assumption of risk, and admitted contributory negligence as a defense, and he points out the distinction between the two and shows that the latter usually includes the former, and he also sounds the note of warning, which may well be applied here, that under statutes so framed one plea may be abolished by name and be reinstated under another name. He says: "Assumption of risk in this broad sense shades into negligence as commonly understood. Negligence consists in conduct which common experience or the special knowledge of the actor shows to be so likely to produce the result complained of, under the circumstances known to the actor that he is held answerable for that result, although it was not certain, intended or foreseen. He is held to assume the risk upon the same ground. Choctaw, Oklahoma & Gulf R. R. Co. v. McDade, 191 U. S. 64, 68. Apart from the notion of contract, rather shadowy as applied to this broad form of the latter conception, the practical difference of the two ideas is in the degree of their proximity to the particular harm. The preliminary conduct of getting into the dangerous employment or relation is said to be accompanied by assumption of the risk. The act more immediately leading
123 to a specified accident is called negligent. But the difference between the two is one of degree rather than of kind; and when a statute exonerates a servant from the former, if at the same time it leaves the defense of contributory negligence still open to the master, a matter upon which we express no opinion, then, unless great care be taken, the servant's rights will be sacrificed by simply charging him with assumption of the risk under another name."

In the case before us, to sustain the plea of assumption of risk, the defendant undertook to prove that the plaintiff continued at work, without objection, having a knowledge of the defect and apprehension of the danger, and to sustain the plea of contributory negligence it relied on the same facts, and the additional one that the plaintiff neglected to shut off the water glass and to use the gauge cocks.

But however this may be, we will consider the question presented from the standpoint of the defendant, and as we have not been referred to any Federal statute as to defective appliances, the violation of which contributed to the plaintiff's injury, we will assume that the defendant is entitled to the benefit of the doctrine of assumption of risk as declared by the Supreme Court of the United States, and will undertake to apply that doctrine to this case.

That Court enforces the rule that it is the duty of the employer to provide reasonably safe and adequate machinery and appliances for the use of the employee and to keep and maintain them in such condition, and that a failure to perform this duty is negligence. Gardner, v. R. R., 150 U. S. 349.

It also holds that the employee assumes the ordinary risks incident to his employment, and that if he continues to work, without objec-

tion, having knowledge of a defect and an apprehension of danger, and is injured, that this is one of the ordinary risks of his employment. R. R. v. McDade, 135 U. S. 570.

But it also holds that negligence of the employer is an
124 extraordinary risk, which the employee does not assume, the Court saying in Choctaw R. R. v. McDade, 191 U. S. 67: "The servant assumes the risk of dangers incident to the business of the master, but not of the latter's negligence. The question of assumption of risk is quite apart from that of contributory negligence. The servant has the right to assume that the master has used due diligence to provide suitable appliances in the operation of his business and he does not assume the risk of the employer's negligence in performing such duties."

We have it then established that the employer is negligent if he fails to provide reasonably safe machinery and appliances, and to keep them in repair; that the employee assumes the risk if he continues to work in the presence of a known defect without objection, and that the employee does not assume the risk of the negligence of the employer.

There is some difficulty in applying these rules to a given case, because if it is the duty of the employer to repair, and a breach of that duty is negligence, and if the employee does not assume the risk of the negligence of the employer, it would seem to be contradictory to say that the employee may assume the risk of an injury caused by a failure to repair.

This apparent conflict is reconciled by imposing upon the employee, if he wishes to be relieved from assumption of risk, the duty of making complaint when he knows of a defect, or could discover it by the exercise of ordinary care, and by referring his conduct, when he does complain, to the principles of contributory negligence, at least for a reasonable time.

The decision in the leading case of Hough v. R. R., 100 U. S. 216, which discusses particularly the assumption of the risk of the negligence of a fellow servant, rests upon this principle. In that case the evidence tended to show that the engine of which deceased had charge, coming in contact with an animal, was thrown
125 from the track over an embankment, whereby the whistle fastened to the boiler was blown or knocked out, and from the opening thus made hot water and steam issued, scalding the deceased to death; that the engine was thrown from the track because the cow-catcher or pilot was defective, and the whistle blown or knocked out because it was insecurely fastened to the boiler; that these defects were owing to the negligence of the company's master-mechanic, and of the foreman of the round-house at Marshall; that to the former was committed the exclusive management of the motive-power of defendant's line, with full control over all engineers, and with unrestricted power to employ, direct, control and discharge them at pleasure; that all engineers were required to report for orders to those officers, and under their direction alone could engines go out upon the road; that deceased knew of the defective condition of the cow-catcher or pilot, and having complained thereof to both the master-mechanic and foreman of the round-house, he was

promised a number of times that the defect should be remedied, but such promises were not kept; that a new pilot was made, but by reason of the negligence of those officers, it was not put on the engine; and the Court, after discussing the case of Farwell v. R. R., 4 Met. 49, and stating that there are well defined exceptions to the general rule as to assumption of risk, says: "One, and perhaps the most important, of those exceptions arises from the obligation of the master, whether a natural person or a corporate body, not to expose the servant, when conducting the master's business, to perils or hazards against which he may be guarded by proper diligence upon the part of the master. To that end the master is boun to observe all the care which prudence and the exigencies of the situation require, in providing the servant with machinery or other instrumentalities adequately safe for use by the latter. It is implied in the contract between the parties that the servant risks the dangers which ordinarily attend or are incident to the business in which he
126 voluntarily engages for compen-sation, among which is the carelessness of those, at least in the same work or employment, with whose habits, conduct and capacity he has, in the course of his duties, an opportunity to become acquainted, and against whose neglect or incompetency he may himself take such precautions as his inclination or judgment may suggest. But it is equally implied in the same contract that the master shall supply the physical means and agencies for the conduct of his business. It is also implied, and public policy requires, that in selecting such means he shall not be wanting in proper care. His negligence in that regard is not a hazard usually or necessarily attendant upon the business. Nor is it one which the servant, in legal contemplation, is presumed to risk, for the obvious reason that the servant, who is to use the instrumentalities provided by the master, has, ordinarily, no connection with their purchase in the first instance, or with their preservation or maintenance in suitable condition after they have been supplied by the master. * * * If the engineer, after discovering or recognizing the defective condition of the cow-catcher or pilot, had continued to use the engine, without giving notice thereof to the proper officers of the company, he would undoubtedly have been guilty of such contributory negligence as to bar a recovery, so far as such defect was found to have been the efficient cause of the death. He would be held, in that case, to have himself risked the dangers which might result from the use of the engine in such defective condition. But 'there can be no doubt that, where a master has expressly promised to repair a defect, the servant can recover for an injury caused thereby, within such period of time after the promise as it would be reasonable to allow for its performance, and, as we think, for an injury suffered within any period which would not preclude all reasonable exception that the promise might be kept.' Shearman & Redf. Negligence, Sec. 96; Conroy v. Vulcan Iron Works, 62 Mo. 35; Patterson v. P. & C. R. W. Co., 76 Pa. St.
127 389; Le. Clair v. The First Division of the St. Paul & Pacific Railroad Co., 20 Minn. 9; Brabbitts v. R. W. Co., 38 Mr. 289. 'If the servant," says Mr. Cooley, in his works on Torts, 559, 'having a right to abandon the service because it is dangerous, re-

frains from doing so in consequence of assurances that the danger shall be removed, the duty to remove the danger is manifest and imperative, and the master is not in the exercise of ordinary care unless or until he makes his assurances good. Moreover, the assurances remove all ground for the argument that the servant, by continuing the employment, engages to assume the risks," and the Court adds, with reference to contributory negligence: "We may add that it was for the jury to say whether the defect in the cow-catcher or pilot was such that none but a reckless engineer, utterly careless of his safety, would have used the engine without it being removed. If, under all the circumstances, and in view of the promises to remedy the defect, the engineer was not wanting in due care in continuing to use the engine, then the company will not be excused for the omission to supply proper machinery, upon the ground of contributory negligence. That the engineer knew of the alleged defect was not, under the circumstances, and as matter of law, absolutely conclusive of want of due care on his part."

In Chicago v. Milwaukee R. R. v. Ross, 112 U. S. 382, after stating the rule as to assumption of risk by the employee, the Court says: "But however this may be, it is indispensable to the employer's exemption from liability to his servant for the consequences of risks thus incurred, that he should himself be free from negligence. He must furnish the servant the means and appliances which the service requires for its efficient and safe performance, unless otherwise stipulated; and if he fails in that respect, and an injury results, he is as liable to the servant as he would be to a stranger. In other words, whilst claiming such exemption, he must not himself be guilty of contributory negligence."

128 Again, in Northern Pac. R. R. v. Herbert, 116 U. S. 652; "Where the employee is not guilty of contributory negligence no irresponsibility should be admitted for an injury to him caused by the defective condition of the machinery and instruments with which he is required to work, except it could not have been known or guarded against by proper care and vigilance on the part of his employer."

Running through all the cases is the idea that the employee assumes the risk, when he continues to work in the presence of a known defect, only when he fails to object.

The latest case we have found is South Western Brewery & Ice Co. v. Schmidt, decided by the Supreme Court of the United States Dec. 2nd, 1912, in which the Court says: "The first point argued is that the defendant was entitled to judgment on the special findings, because the fourth was that the cooker at the time was not in such a bad condition that a man of ordinary prudence would not have used the same. But the eleventh was that the defendant did not use ordinary care in furnishing the cooker and in having it repaired, and the sixth, that the defendant promised the plaintiff that the cooker should be repaired as an inducement for him to continue using it. So it is evidence that the fourth finding meant only that the plaintiff was not negligent in remaining at work. Whatever the difficulties may be with the theory of the exception

(1 Labbatt Mast. & Ser., chap. 22, § 423), it is the well settled law that for a certain time a master may remain liable for a failure to use reasonable care in furnishing a safe place in which to work, notwithstanding the servant's appreciation of the danger, if he induces the servant to keep on by a promise that the source of trouble shall be removed. Hough v. Texas, & P. R. Co., 100 U. S. 213, 25 L. Ed. 612."

The text books very generally declare the same doctrine.

"There is no longer any doubt that where a master has expressly promised to repair a defect, the servant does not assume the
129 risks of any injury caused thereby within such a period of time after the promise as would be reasonably allowed for its performance, or indeed, within any period which would not preclude all reasonable expectation that the promise might be kept." 1 Shearman & Redfield on Negligence, §215, p. 372.

"It is also negligence for which the master may be held responsible, if knowing of any peril which is known to the servant also, he fails to remove it in accordance with the assurances made by him to the servant that he will do so. This case may also be planted on contract, but it is by no means essential to do so. If the servant, having a right to abandon the service because it is dangerous, refrains from doing so in consequence of assurances that the danger shall be removed, the duty to remove the danger is manifest and imperative, and the master is not in the exercise of ordinary care unless or until he makes his assurances good. Moreover, the assurances remove all ground for the argument that the servant, by continuing the employment, engages to assume its risks. So far as the particular peril is concerned, the implication of law is rebutted by the giving and accepting of the assurance, for nothing is plainer or more reasonable than that parties may and should, where practicable, come to an understanding between themselves regarding matters of this nature." Cooley on Torts, p. 1156.

"An obvious corollary from the principles explained in §424, subds. a, b, supra, is that, as long as the period is running which is conceived to be covered by the promise, the defense of an assumption of the given risk cannot be relied upon by the master. This doctrine is affirmed or taken for granted in all the decisions cited at the place referred to." Labatt Master & Servant, sec. 425.

In the note to Miller vs. Monument Co., 18 A. & E. Ann. Cases
961, there is a very full citation of authority upon
130 the distinction between assumption of risk and contributory negligence, which it is not necessary for us to consider further, as the case is presented, and in the note to Foster v. R. R., 4 A. & E. Ann. Cases 153, the editor, in dealing with the effect of a promise to repair on assumption of risk, cites decisions from thirty-five States, and others from the Federal Courts, including the Hough case, in support of the statement that, "It is a well settled general rule that the assumption of risk implied from a servant's knowledge that a tool, instrument, appliance, piece of machinery or place of work, is defective or dangerous, is suspended by the master's promise to repair, made in response to the ser-

vant's complaint, so that if the servant is induced by such promise to continue at work, he may recover for an injury which he sustains by reason of such defect within a reasonable time after the making of the promise, provided he exercises due care, unless the defect renders the appliance so imminently dangerous that a prudent person would decline to use it at all until it was repaired," and this last contingency is dealt with in the Hough case, supra, under contributory negligence.

Applying these principles to the evidence, we are of opinion that the charge of His Honor was favorable to the defendant, upon the issue of assumption of risk.

The plaintiff took charge of the engine on July 27th, 1910, and was injured while operating it on August 4th, 1910.

He testified, among other things, that he discovered the absence of the guard glass on his first trip out, and that upon his return on the next day, he told the round-house foreman, to whom complaint ought to have been made, and whose duty it was to repair, that the guard glass was gone, and asked if he had one, and that the foreman replied, "they did not keep them in stock here, that they were made in Portsmouth, and he would have to send to Portsmouth to get one—to run her like she was. He said he would send to Portsmouth and get me one;" that he had the talk with the foreman between 3 and 5 o'clock and told him the shield or guard glass
131 was gone and he wanted one, and that the foreman said he had none in stock, and to run the engine as it was and he would send to Portsmouth and get him a shield or guard glass; that he knew there was some danger, but that he was told by the foreman to go ahead and operate without the shield, and if he had not done so, he would have lost his job.

The foreman denied that any complaint was made to him.

In this conflict of evidence it was for the jury to determine the fact, and upon this phase of the case, His Honor, among other things, charged on the second issue as to assumption of risk as follows: "On the other hand, the employer has the right to assume that his employee will go about his work in a reasonably safe way and give due regard to the machinery and appliances which are in his hands and under his control and if you should find from the evidence, by its greater work, because the burden in this instance is on the defendant, that the plaintiff knew of the absence of the guard or shield to the water *guage* and failed to give notice to the defendant or to the agent whose duty it was to furnish the water *guage* and appliance, and he continued to use it without giving that notice, it being furnished to him in a safe condition, then he assumed the risk incident to his work in the engine with the glass water *guage* in that condition, although he might have handled his engine in every other respect with perfect care. If it was received in good condition and he failed to give notice, and if he did work with it in its present condition, without the shield or guard, he then assumed the risk. How was that? It is a question of evidence for you. Did he give the notice? Did he assume the risk by failing to

give notice, keeping the knowledge of the absence of the guard glass within his own breast.

But if you find that he gave notice to the foreman of the roundhouse, and if you should find that the use of the water gauge was not so obviously dangerous that a reasonably prudent man, careful of himself not to get hurt, while he was about his work, and went on and used it, he would not assume the risk, but if the danger
132 was so apparent that a reasonably prudent man, careful of himself not to receive injury, would see that he was in imminent danger and would observe by the use of it that he was endangering himself by going on and working with it, and he continued to work with it, he would be assuming the risk and responsibility and it would be your duty to answer that issue, 'Yes.' If it was so obviously dangerous that a reasonably prudent man would not use it, and he continued to use it instead of using the other, he would assume the risk."

It therefore appears that the defendant not only had the benefit of the rule that the employee assumes the risk if he works in the presence of a known danger without objection, but in addition, and as a distinct and separate proposition, that the plaintiff assumed the risk, although he objected, if he continued to work when a man of ordinary prudence would see that there was greater danger of being hurt than otherwise, which would not be assumption of risk, but evidence of contributory negligence.

The third, fourth and fifth prayers for instructions were properly refused, because directed to the second issue, instead of to the third, to which they were applicable.

We have thus far considered the case under the decisions of the Federal Court. If we applied the provisions of the Fellow Servant Act of this State, as construed by our Court, there could be no issue as to assumption of risk. Coley v. R. R., 129 N. C.

We have not been inadvertent to the other exceptions appearing in the record, seventy-two in number, but have examined them with care, and find no reversible error.

No error.

133 Clark C. J. concurs: On the further ground that the following paragraph in sec. 4 of the Federal Employers' Liability Act "Such employee shall not be held to have assumed the risk of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employees," merely emphasizes the fact that in such cases there is no assumption of risk. It can not be construed, fairly, to be an implied provision that assumption of risk is a defense in all other cases.

Besides assumption of risk lies in contract, and under the provision of Rev. 2646 "Any contract or agreement, expressed or implied, made by any employee of such company to waive the benefit of this section shall be null and void," it has been repeatedly held that the doctrine of assumption of risk has been eliminated by this section. Biles v. R. R. 143 N. C. 78; Thomas v. R. R. 129 N. C. 392; Cogsdell v. R. R. 129 N. C. 398; Coley v. R. R. 128 N. C. 534.

Such contract therefore being null and void under our statutes, it can not be a defense, which depends upon the validity of such contract.

134 No. 221.

HORTON
v.
SEABOARD AIR LINE RAILWAY.

BROWN, *J.*, dissenting.

The evidence in this case tended to establish the following facts: The plaintiff, at the time of the injury, had been employed by the defendant as engineer for a period of six years, and as fireman for three or four years prior to his promotion. It appeared from the work reports, identified by the plaintiff, that he first made a report on this engine on July 28th, after his return from a round trip requiring two days. The explosion of the water glass, of which he complains, occurred August 4th, upon his return from the third or fourth trip to Aberdeen. At the time of the explosion plaintiff was looking at the glass.

The engine, No. 752, which plaintiff was operating, was equipped with a patented water glass, which was so constructed that a thick guard glass was placed over the front of the water glass to protect the eyes of the engineer in the event the inner glass should explode. The engine was also equipped with an alternative method of determining the amount of water in the boiler by means of *gua*ge cocks.

It was the plaintiff's duty, upon boarding the engine, to look at his water glass, and test his *gua*ge cocks, the latter being three cocks placed at intervals on the front of the boiler, in order to see that both were in working order.

On the morning plaintiff was called to take this engine (he had prior to that time been operating a passenger train) and use it in operating a freight train from Raleigh, N. C., to Aberdeen,
135 N. C., he noticed before leaving Raleigh that there was no shield or guard on the water glass. Without making complaint of the condition of the glass, plaintiff made the trip to Aberdeen and return. Upon his arrival in Raleigh at the end of his round trip, he made a written report of the condition of his engine upon forms provided for that purpose, and in accordance with the defendant's requirements he placed the reports on a file in the round house or put them in a box there for that purpose. This, according to the plaintiff's evidence, was the way provided by the company for procuring repairs.

George Steele, plaintiff's witness, and a number of defendant's witnesses, said that these work reports were required to be in writing, that they were filed and destributed among the workmen for the purpose of making the required repairs.

It appears in evidence that plaintiff made a written report on this engine at the return of each round trip, and noted every defect in his engine except the absence of the guard glass. When asked by

the Superintendent of the division on which he was employed why he failed to report the absence of the guard, he said that it was for reasons best known to himself.

On August 4th, 1910, while engaged in shifting cars at Apex, N. C., the plaintiff testified that the water glass exploded and injured his eye. Immediately after the explosion he cut off the gauge glass at top and bottom, and the engine was operated to Raleigh with the gauge cocks as the means of determining the amount of water in the boiler.

The guard glass referred to as part of the Buckner equipment is a thick piece of glass two or three inches wide, and eight or nine inches long, with a thickness of a quarter or three-eighths of an inch, and is detached from the gauge, being placed in slots arranged for the purpose of holding it. The Buckner gauge is not a complicated piece of machinery, but is a brass tube with an
136 opening in front and containing a small glass tube. A thick piece of glass or two thin pieces of the proper size could be cut and placed in the slot and would serve the purpose of a guard glass.

Plaintiff testified that after he returned from the first trip to Aberdeen, he ran the engine to the coal chute track, or track opposite the turntable, and told Mr. Matthews, the round house foreman, that the guard glass was gone, and asked him if he had one. "He said they did not keep them in stock here, but they were made in Portsmouth and that he would have to send to Portsmouth to get one, to run her like she was. He said he would send to Portsmouth and get me one. After Mr. Matthews told me he did not have any, I went to Charlie Murray, the glass cutter for the Baker-Thompson Lumber Company and told him I wanted him to make me a guard glass and gave him the measurements."

The conversation with Matthews, testified to by plaintiff, occurred on July 28th. Plaintiff's work reports show that he made two round trips with this engine after that time and before his injury. The accident occurred August 4th, six days after the conversation with Matthews, and during that time plaintiff was aware of the defective condition of the water glass and knew that it had not been repaired.

Matthews denied that he told plaintiff the guard glasses were kept in Portsmouth and to go ahead and run his engine and that he would send and get one. He said he had no recollection of having a conversation with Horton.

Plaintiff's testimony leaves no doubt of the fact that he was fully aware of the danger of using the water gauge without the protection of the guard glass.

George Steele, a witness for plaintiff, explained the duties of an engineer as follows:

"I have been an engineer on the Seaboard six or eight years. I am familiar with the duties of an engineer. It is his duty to see that his engine is in proper working order and properly
137 equipped. He reports 30 minutes beforehand for that purpose. He is paid for that time. He is paid until he gets

off duty. He is allowed fifteen or twenty-five minutes from the time he cuts loose from his train.

Engineers are supposed to inspect engines before they give them up and make out a work report in writing. It is required by the company to be in writing and signed by the engineer. That work report is filed in the roundhouse, and the work distributed among different ones to have the defects remedied. It is the engineer's duty to report defects discovered in his cab and report them on his work report. When an engineer gets on his engine in the morning he tests the guage cocks to see that they are working. He tests his guage glass to see that it is in shape and in working order.

The gauge cocks indicate how much water is in the boiler. You could operate the engine with guage cocks alone without the water glass. The water glass is arranged so that if anything should happen you could cut it off, top and bottom; that cuts it clean out, so that it is impossible for it to explode. But with the steam on and the water on, and this guard glass gone, that inner tube is nothing but a thin tube of glass. Whatever pressure the engine carries is on there. Those glasses explode frequently. Nobody can tell when one is going to explode. One might last fifteen minutes and one thirty days. One has never exploded with me. They buzz a little when they are going to explode. The purpose of the guard glass is to protect anybody in the cab. It protects the engineer from explosion. Without the guard glass, he is liable to be injured by flying glass.

On the line of road, if I discovered the guard glass was gone, I would report it in writing on the work report when I got in. It could be gotten by requisition from the store room. My duty would be to notify the foreman. It is the engineer's duty to report any defects they see on the engine in writing."

138 At the conclusion of the evidence, defendant moved for judgment of nonsuit upon the ground that plaintiff's evidence showed that he assumed the risk of injury from the explosion of the water glass. I think this motion should have been allowed. If it is true, as testified by plaintiff, that he reported the defect and was given a promise to repair, his testimony shows that he continued to use the defective water glass when the danger was so imminent that a man of ordinary prudence would not have used it, and in doing so he continued to assume the risk of injury.

The Federal questions in this case are properly raised, and in order to dispose of the appeal, it is necessary that they should be passed upon by this Court. The construction of the National Employer's Liability Act is involved, which is in itself sufficient to give jurisdction to the Supreme Court of the United States if the case should be taken to that court.

Railroad vs. Wolfe, 33 Sup. Ct. Rep. 135. In an action brought by an employee against a carrier for an injury sustained while engaged in interstate commerce, the federal act is supreme. Congress having acted the competency of the State to regulate the matter is withdrawn, and all State legislation on the subject is superseded. Mondou vs. R. R., 223 U. S. 1. The right of action created by this act is exclusive and the employee has no right of action either at

common law or under State statutes regulating the relation of master and servant. Railroad vs. Wolfe, supra.

The plaintiff in the case before us brought his suit under the federal act and the defendant admitted that act to be controlling and pleaded as a defense plaintiff's contributory negligence and assumption of risk. The defendant takes the position that assumption of risk as a defense is affected by the federal act only to the extent of being abolished in cases where the violation by
139 the carrier of some statute enacted for the safety of employees contributed to the injury; that in other respects the defense of assumption of risk is unaffected and is to be determined by the principles of the common law as interpreted by the United States Supreme Court.

Section 4 of the Act provides: "That in any action brought against any common carrier under or by virtue of any of the provisions of this act to recover damages for injuries to or the death of any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

The legislative history of this act, which is a proper aid to its construction (11 Encyc. U. S. Supreme Court Reports, 143) shows the clear intention of Congress to modify the common law defense of assumption of risk only to the extent shown by this section. The Act of 1906, which was held unconstitutional, contained no reference to assumption of risk. The Act of 1908, as introduced in Congress, provided in Section 6 that the employee "shall not be held to have assumed the risk of his employment in any case where the violation of law by such common carrier contributed to the injury or death of such employee."

Before the passage of the act, this broad language was changed to read "where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee." By incorporating this section in the act, I think Congress indicated clearly that it did not regard the defense of assumption of risk as having been abolished by the other provisions of the act, and did not intend the act to have such effect.

In Freeman vs. Powell, 144 S. W. 1033, it is expressly held that assumption of risk is a defense to an action brought under this act, and the language of the Supreme Court of the United States, 223 U. S. at pages 49 and 50, leads me to conclude that in the opinion of that Court assumption of risk will bar the right of a
140 plaintiff to recover unless the negligence of the master consists in the violation of a federal statute enacted for the servant's safety. The fact that contributory negligence is abolished as a complete defense by Section 3 of the Act can have no effect on the defense of assumption of risk. The two defenses are separate and distinct. In the case of Schlemmer vs. Railroad, 205 U. S., page 1, quoted by Mr. Justice Allen as sounding a note of warning that one plea may be abolished by name and reinstated under another name, four Justices dissented, and when the case again came before the Court, Mr. Justice Day, who had formerly dissented, wrote the

opinion of the Court, holding that a statute abolishing assumption of risk did not affect the defense of contributory negligence. The converse of this proposition sustains the view that a statute which abolishes contributory negligence has no effect upon the defense of assumption of risk.

It is not contended in this case that the defendant has violated any statute enacted for the safety of employees, and, therefore, assumption of risk, if established, would operate to defeat the plaintiff's cause of action. The Court below accepted this as a correct construction of the federal act, and submitted the following issues:

1. Was the plaintiff injured by the negligence of the defendant as alleged in the complaint?

2. If so, did the plaintiff assume the risk of injury, as alleged in the answer?

3. Did the plaintiff by his own negligence contribute to his injury as alleged in the answer?

4. What damage, if any, is the plaintiff entitled to recover?

Having submitted an issue of assumption of risk, his
141 Honor was confronted with the question whether such assumption of risk should be determined by the principles announced by this Court or by the decisions of the Supreme Court of the United States.

It is clear that the decisions of the two jurisdictions are in conflict. The trial Judge followed the decisions of this Court, and however correct they may be when applied to a cause of action arising under the State law, I think our decisions are contrary to those of the Supreme Court of the United States and are not controlling in this action. The charge cannot be read without reaching the conclusion that his Honor regarded the law of North Carolina as controlling.

He said: "Plaintiff has brought this suit under the United States statute, and where Congress enacts a law within the limits of its power, that law should be enforced uniformly throughout the entire United States. If it is in conflict with the State law, the State law is superseded, but where there is no conflict expressed by the statute of the United States, then the rule of the State prevails.

And in this act under which this suit is brought, it is provided that any action brought against any common carrier under and by virtue of any of the provisions of this act to recover damages for injuries to or death of any of its employees, such employee shall not be held to have assumed the risk of his employment in any case where the violation by such a carrier of any statute enacted for the safety of employees contributed to the injury or death of such employees.

There has been no statute provided as applies to this glass water gauge which has been called to the attention of the Court, so that leaves it open to the rights which the plaintiff might have under the law of this State, and the question of assumed risk, as has been argued by one, if not more, of counsel, grows out of the contractual relations between plaintiff and defendant."

142 The following instructions, which are not quoted in the opinion of the Court, were given over defendant's objection and exception:

"A man assumes the risk, when he takes employment, incident to the class of work which he has to perform.

Some classes of work are more dangerous than others. The position of a locomotive engineer might well be regarded as more hazardous than other employments, therefore, he assumes the risk of that character of employment, but he has the right when he enters into employment of that class of work to assume that his employer has done what the law requires it to do in providing him a reasonably safe place to work, with reasonably safe appliances with which to do his work, consistent with the character of the work which is to be performed.

He does not assume the risk incident to the negligence of his employer in providing machinery and appliances with which he has to work."

And in another part of the charge, this language is used:

"And the same rule applies if the use of the glass without the shield was not so obviously dangerous as to cause a reasonably prudent man to stop the use of it, his going on and using it, of itself, would not be assuming the risk in the use of it.

If it was so obviously dangerous that a reasonably prudent man would not use it, and he continued to use it instead of using the other, he would assume the risk."

The instructions quoted in the Court's opinion, which it is said properly present the defendant's contention that by continuing to work in the face of a known danger plaintiff assumed the risk of injury, are made dependent upon a finding by the jury that the guard glass was furnished to the plaintiff in a safe condition.

It will be found that the intsruction read: "If it was
143 received in good condition and he failed to give notice, and if he did work with it in its present condition without the shield or guard glass, he then assumed the risk." Such limitation is improper.

Whether the danger existed at the time plaintiff undertook the operation of the engine, or arose while he was engaged in its operation is immaterial. If it was furnished him in a defective condition and he became aware of the existence of the defect and continued to work without objection and promise to repair, he assumed the risk.

The jury had been instructed positively that the servant does not assume the risk incident to the negligence of the master in providing machinery and appliances with which he has to work, and in carrying out this view the Court makes assumption of risk dependent upon the defendant's having furnished the glass in a safe condition. Plaintiff testified that when the engine was turned over to him, the guard glass was defective. If the jury believed this evidence it was impossible to find that he assumed the risk as set forth in his Honor's instructions.

The doctrine of assumed risk as adopted by this Court is stated in Hicks vs. Mfg. Co., 138 N. C., 319, as follows: "An employee will not be deemed to have assumed the risk from the fact that he works on in the presence of a known defect unless the danger be so immi-

nent that no man of ordinary prudence and acting with such prudence would incur the risk which the conditions disclose." And this Court has repeatedly said that the servant never assumes the risk incident to the negligence of the master in providing machinery and appliances with which he has to work.

The jury in this case was instructed in practically the exact language of our decisions. The Supreme Court of the United States has held in a uniform line of decisions, which I shall refer to later,

that the servant does assume the risk of injury resulting
144 from the negligence of the master when the danger is known to the servant and appreciated by him and he continues to work in the face of such danger without objection.

The defendant requested the following instructions:

"The Court charges you that if you believe — the evidence the plaintiff assumed the risk of injury from the explosion of the water glass, *and* you will answer the second issue "Yes."

"The Court charges you that the Statute of North Carolina, Revisal Section 2646, abolishing assumption of risk as defense to an action brought against a railroad company by one of its employees, has no application in this case, and if you find that the plaintiff assumed the risk of injury from the explosion of the water glass, you will answer the second issue "Yes."

"The right of the plaintiff to recover damages in this action is to be determined by the provision of the Federal Employer's Liability Act enacted by Congress at the session of 1908, and the Court charges you that if you find by a preponderance of evidence that the water glass on the engine on which plaintiff was employed was not provided with a guard glass and the condition of the glass was open and obvious and was fully known to the plaintiff and he continued to use such water glass with such knowledge and without objection, and that he knew the risk incident thereto, then the Court charges you that the plaintiff voluntarily assumed the risk incident to such use, and you will answer the second issue "Yes."

The Court gave this instruction as applicable to the issue of contributory negligence and instead of the words "then the Court charges you that the plaintiff voluntarily assumed the risk incident to such use and you will answer the second issue "Yes," used the words, "then the Court charges you that the plaintiff was guilty of contributory negligence, and you will answer the third issue "Yes."

145 "If you find by the greater weight of the evidence that the water glass was defective, and that the plaintiff knew of the condition of the water glass on the engine and the danger incident to its use, and there was open to him a safe way of operating the said engine by using the gu*a*ge cocks, and that he voluntarily used the water glass in operating the engine, the Court charges you that the plaintiff assumed the risk of injury from the use of the water glass, and you will answer the second issue 'Yes.'"

The Court refused these requests for instruction.

His Honor's charge and the defendant's requests for instruction, particularly the second request quoted, present the conflicting views

of the doctrine of assumption of risk. The defendant contends that the requested instructions are in accord with, and the charge as given in conflict with, the decisions of the *the* Supreme Court of the United States.

In this I think the defendant is correct. The common law conception of assumption of risk is still the prevailing doctrine in the great majority of the State courts, and in the United States courts. Labbatt on Master & Servant says:

"The doctrine applied in the older English cases and in all the American cases up to the present time, with a few possible unimportant exceptions, is that, in the case of all adult servants, except seamen, the actions must be declared not to be maintainable, as a matter of law, if the evidence leaves no reasonable doubt that the servant comprehended the abnormal risk which caused his injury." (Page 7.)

"The doctrine that a servant who has no knowledge, actual or constructive, of an ordinary risk is not chargeable with its assumption, is implied in every jurisdiction in which the principles of the common law are recognized. The logical converse of this doctrine,
viz: that a servant is to be regarded as having assumed extra-
146 ordinary risk of which he had, or ought to have obtained, knowledge before his injury was received, was also applied universally until comparatively recent times, and is still the prevailing rule in the United States." (Sec. 274.)

In support of the above text the author cites the English cases and decisions of the Supreme Court of the United States and the Federal Circuit and District Courts and the Courts of Alabama, Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Hampshire, New Jersey, (North Carolina does not appear,) Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, and Wisconsin. See also Labatt, secs. 271, 174a, 276 and 280, and pages 632, 633, 640 and 641.

"In all the English cases decided before the passage of the employers' liability act, the courts proceeded upon the hypothesis that an assumption of an extraordinary risk was properly inferred, as a matter of law, from the mere fact that the servant accepted or continued in the employment with a knowledge of its existence and a full comprehension of the enhanced danger to which he was exposed." (Sec. 280.)

Judge Thompson in his work on Negligence says that if a servant, with knowledge of a defect in a machine which he is employed to operate, continues in the employment without objection or complaint, he is deemed to assume the risk of the danger; that this doctrine is so plain that it could hardly be made plainer by multiplying special statements and explanations. (Sections 4608, 4609.) "It is a part of this doctrine," Judge Thompson says in another section (4707), "that the servant assumes the risks of known defects in machinery, tools, appliances, etc., or of improper appliances furnished for the performance of a particular task, or where no proper

appliances are furnished, although the defect or danger re-
147 sults from the negligence of the master, or from his violation of a statute, or a municipal ordinance."

In Butler vs. Frazee, 21 U. S. 459, it is held that "One understanding the condition of machinery and dangers arising therefrom, or who is capable of doing so, and voluntarily, in the course of employment, exposes himself thereto, assumed the risk thereof and if injury results cannot recover against the employer."

In Texas & Pacific Railway Company vs. Archibald, 170 U. S. at pages 671 and 672, Mr. Justice White (now Chief Justice) says: "The elementary rule is that it is the duty of the employer to furnish appliances free from defects discoverable by the exercise of ordinary care and that the employee has a right to rely upon the duty being performed whilst in entering the employment he assumes the ordinary risks incident to the business, he does not assume the risk arising from the neglect of the employer to perform the positive duty owing to the employee with respect to appliances furnished.

An exception to this general rule is well established, which holds that where an employee receives for use a defective appliance and with knowledge of the defect continues to use it without notice to the employer he cannot recover for an injury resulting from the defective appliance thus voluntarily and negligently used. * * * The employee is not compelled to pass judgment on the employer's methods of busines or to conclude as to their adequacy. He has a right to assume that the employer will use reasonable care to make the appliances safe and to deal with those furnished relying on this fact, subject of course to the exception which we have already stated by which when an appliance is furnished an employee in which there exists a defect known to him, or plainly observable by
148 him, he cannot recover for an injury caused by such defective appliance if, with the knowledge above stated he negligently continues to use it.'

The very case relied upon by the Court to sustain the statement that a servant does not assume the risk arising from the master's negligence refers to the well established exception that the servant does assume the risk of injury resulting from the negligence of the master when the conditions brought about by such negligence are known to the servant and the danger appreciated. Railroad vs. McDade, 191 U. S. 67.

In Railway vs. Shalstrom, 195 Fed. 729, it is said: "Although the risk of the master's negligence and of its effect unknown to the servant is not one of the ordinary risks of the employment which he assumes, yet if the negligence of the master or its effect is known and appreciated by the servant, or is obvious, or 'so patent as to be readily observed by him by the reasonable use of his senses having in view his age, intelligence and experience,' and he enters and continues in the employment without objection, he elects to assume the risk of it, and he cannot recover for the damages it causes," citing Railway vs. Archibald, supra.

A very comprehensive review of the authorities on this question will be found in St. Louis Cordage Co. vs. Miller, 126 Fed. 508, in

which Judge Sanborn says: "The authorities and opinions to which reference has now been made have forced our minds irresistibly to the conclusion that the following rules of law have become irrevocably settled by the great weight of authority in this country and by the opinions of the Supreme Court, which upon well settled principles, must be permited to control the opinions and actions of this court:

"A servant by entering or continuing in the employment of a master assumes the risks and dangers of the employment which he knows and appreciates, and also those which an ordinarily
149 prudent person of his capacity and intelligence would have known in his situation.

"A servant who knows, or who by the exercise of reasonable prudence and care would have known, of the risks and dangers, which arose during his service, but who continues in the employment without complaint, assumes those risks and dangers to the same extent that he undertakes to assume those existing when he enters upon the employment.

"Among the risks and dangers thus assumed are those which arise from the failure of the master to completely discharge his duty to exercise ordinary care to furnish the servant with a reasonably safe place to work and reasonably safe appliances and tools to use.

"Assumption of risk and contributory negligence are separate and distinct defenses. The one is based on contract, the other on tort. The former is not conditioned or limited by the existence of the latter, and is alike available whether the risk assumed is great or small and whether the danger from it is imminent and certain or remote and improbable.

"The Court below fell into an error when it instructed the jury that, although the plaintiff continued in the employment of the defendant by the side of the visible unguarded gearing with full knowledge that the cogs which injured her were uncovered, still she could not be held to have assumed the risk of working by their side unless the danger from them was so imminent that persons of ordinary prudence would have declined to incur it under similar circumstances."

In Kyner vs. Mining Co., 184 Fed. 43, Mr. Justice Vandevanter, who was then Circuit Judge, says: "As respects the first specification of negligence, it conclusively appeared that the absence of the guard about the drum and lower cable was so patent as to be readily
150 observed; that the enhanced danger arising therefrom was so obvious that its appreciation by the plaintiff was unavoidable in view of his years, intelligence and experience and that under those conditions he voluntarily continues to work about the drum and cable. So even if the absence of the guard was a negligent omission on the part of the defendant, the Court was bound to rule as a matter of law that the plaintiff assumed the risk," citing Butler vs. Frazee, 211 U. S. 459. See also Brick Co. vs. Miller, 181 Fed. 830; Katalla vs. Rones, 186 Fed. 30.

It is useless to multiply authorities because the standard by which assumption of risk will be measured in construing the federal act is

indicated by the language of Mr. Justice Vandevanter in Mondou vs. Railroad, 223 U. S., pages 49 and 50.

In referring to the departures from the common law made by the act, he says: "The rule that an employee was deemed to assume the risk of injury, even if due to the employer's negligence, where the employee voluntarily entered or remained in the service with an actual or presumed knowledge of the conditions out of which the risk arose, is abrogated in all instances where the employer's violation of a statute enacted for the safety of his employees contributed to the injury."

I think his Honor clearly fell into error prejudicial to the defendant in his instructions on the issue of contributory negligence. It is true that issue was answered in favor of the defendant, but the Court gave the jury the right to answer that issue in the affirmative upon the finding of facts that clearly entitled the defendant to have the second issue answered in its favor. His Honor confused contributory negligence and assumption of risk in such manner as to be misleading. Referring to the issue of contributory negligence he says:

151 "That is governed largely by the same rules as applied to the question of assumption of risk. Did he continue to use the glass gauge when it was — obviously dangerous that a reasonably prudent man careful of himself would not do it? Was the danger so apparent that a reasonably prudent man would cease to use that and use the other gauge? If so, it would be your duty to answer the third issue 'Yes' ".

"But if the danger was not so obvious that a reasonably prudent man, careful of himself, would not realize the danger of using the water glass, and he continued to use it, he would not be guilty of contributory negligence."

"If you find by the preponderance of the evidence that the water glass by which plaintiff was injured was not provided with guard glass and the condition of the water glass was open and obvious and was fully known to the plaintiff, and he continued to use such water glass with such knowledge and without objecting, and knew the risk incident thereto, then the Court charges you that the plaintiff was guilty of contributory negligence, and you should answer the third issue 'Yes' ".

In Schlemmer vs. R. R., 220 U. S. 590, it is held that: "There is a practical and clear distinction between assumption of risk and contributory negligence. By the former the employee assumes the risk of ordinary dangers of occupation and those dangers that are plainly observable; the latter is the omission of the employee to use those precautions for his own safety which ordinary prudence requires."

R. R. vs. McDade, 191 U. S., 64.

Labatt on Master & Servant, pages 747, 749, 767 and 772.

I do not think the opinion of the Court in this case is sound in assuming that if plaintiff gave notice of the absence of
152 the guard glass that alone would be sufficient to relieve him from the charge of assumption of risk. The authorities hold

that there must be a complaint and promise to repair and it must appear that the servant continued to work relying upon the promise.

Labatt on Master & Servant, Sections 418-419 and cases cited;
Dailey vs. Fiberloid Co., 186 Mass. 318;
Hood vs. Packing Co., 133 S. W. 446.

In discussing the standard by which assumption of risk must be measured in our case, the Court starts out with the statement that a servant never assumes the risk of the negligence of the master and ends with the authorities to the effect that "the assumption of risk implied from a servant's knowledge that a tool, instrument, appliance, piece of machinery or place of work is defective or dangerous is suspended by the master's promise to repair."

Without regard to a promise to repair, the Court below instructed the jury that a servant does not assume the risk of injury from danger created by the negligence of the master and he refused to instruct the jury that if plaintiff continued to use the water glass with knowledge of its defective condition and without objection, and knew the risk incident thereto, he assumed the risk of injury.

To say that the employee assumes the risk if he continues to work in the presence of a known danger without objection and the employee does not assume the risk of the master's negligence is to assert a proposition and deny it in the same sentence. Yet in the opinion of this Court, these two propositions are said to be established by the decisions of the Supreme Court of the United States.

This conflict is noted and is said to be reconciled by im-
153 posing upon the employee, if he wishes to be relieved from assumption of risk, the duty of making complaint when he knows of a defect or could discover it by the exercise of ordinary care, and by referring his conduct, when he does complain, to the principles of contributory negligence at least for a reasonable time.

In my opinion this does not reconcile the conflict, because if the servant does not assume the risk of the negligence of the master, it can make no difference whether he makes complaint of the defect or not. If the defect resulted from the negligence of the master and the risk is not assumed, what is the necessity for making complaint?

The Hough case, which the Court says explains this anomaly is based upon the assumption that there was a complaint by the employee and a promise to repair and under such circumstances the burden of the risk is shifted to the master for a reasonable time, unless the danger is so obvious that a man of ordinary prudence would not continue to work in the face of it, in which event the assumption of the risk remains with the servant in spite of the complaint and promise.

In our case the evidence of the complaint and promise to repair was in direct conflict and the instructions requested by the defendant were based upon the jury's finding that the plaintiff had not complained of the condition of the water glass.

In any view of the charge of the Court, there are conflicting

instructions on material points, and under such circumstances this Court should direct another trial.

Williams vs. Haid, 118 N. C., 481;
Edwards vs. R. R., 129 N. C. 78;
Westbrook vs. Wilson, 135 N. C., 402.

154 Supreme Court of North Carolina, February Term, 1913.

No. 221. Wake.

J. T. HORTON
v.
SEABOARD AIR LINE RAILWAY.

Judgment.

This cause came on to be argued upon the transcript of the record from the Superior Court of Wake County. Upon consideration whereof, this Court is of opinion that there is no error in the record and proceedings of said Superior Court.

It is therefore considered and adjudged by the Court here, that the opinion of the Court, as delivered by the Honorable W. R. Allen, Justice, be certified to the said Superior Court, to the intent that the judgment be affirmed.

And it is considered and adjudged further that the defendant and surety do pay the cost of the appeal in this Court incurred, towit, the sum of Twenty two 55/100 Dollars ($22.55) and execution issue therefor.

155 Supreme Court of the United States, October Term, 1913.

No. —.

SEABOARD AIR LINE RAILWAY, Plaintiff in Error,
v.
JAMES T. HORTON, Defendant in Error.

Petition for Writ of Error.

Considering itself aggrieved by the final decision of the Supreme Court of North Carolina in rendering judgment against it in the above-entitled case, the Plaintiff in Error hereby prays for a writ of error from the said decision and judgment to the United States Supreme Court, and an order fixing the amount of the supersedeas bond.

This was a suit brought by the defendant in error, an employee of the plaintiff in error, against the plaintiff in error, a railroad, for damages under the Federal Employer's Liability Act, enacted by the Congress of the United States April 22, 1908, and the amendments thereto (pp. 5 and 11, Rec.)

To the complaint plaintiff in error filed answer and amended answer (pp. 6 to 7 and 8 to 11, Rec.). The following issues were submitted to the jury by the trial court, namely:

1. Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint?

2. If so, did the plaintiff assume the risk of injury, as alleged in the answer?

3. Did the plaintiff by his own negligence contribute to his injury, as alleged in the answer?

4. What damage, if any, is the plaintiff entitled to recover?

156 The jury answered the first issue, "Yes." The second issue, "No." The third issue "Yes." And to the fourth issue, gave a judgment of seven thousand five hundred dollars (p. 14, Rec.)

The case was appealed to the Supreme Court of North Carolina. The said Court by its judgment, a copy of which is certified to in the record, sustained the decision of the lower Court.

The errors complained of in this petition, and more fully set forth in the Assignment of Errors accompanying this petition, are, that the Supreme Court of North Carolina decided against the rights set up and claimed by your petitioner under the Federal Employer's Liability Act, above referred to, in that it gave instructions objected to, and denied instructions that had been asked by your petitioner in the court below, which denied to your petitioner the construction to which it was entitled of the Federal Employer's Liability Act.

Errors are also assigned in the Assignment accompanying this petition, to certain holdings of the Supreme Court of North Carolina in its opinion.

Recognizing that properly the opinion of the Supreme Court of North Carolina may not be strictly speaking a part of the record, of that court which this Court will review, the holdings above referred to so emphasize the intention of the construction which the judgment of the court put upon this statute, that we have cited these holdings as errors.

Assignment of Errors herewith attached.

BENJ. MICOU,
MURRAY ALLEN,
Attorneys for Plaintiff in Error.

Allowed this Aug. 2, 1913.

J. R. LAMAR,
Associate Justice S. C. U. S.

157 Supreme Court of the United States, October Term 1913.

No. —.

SEABOARD AIR LINE RAILWAY, Plaintiff in Error,
v.
JAMES T. HORTON, Defendant in Error.

Assignment of Errors.

Now comes the above plaintiff in error and files herewith its petition for a writ of error, and says that there are errors in the record and proceedings of the above-entitled case, and for the purpose of having the same reviewed in the United States Supreme Court makes the following assignment:

The Supreme Court of North Carolina erred in its construction of the Federal Employer's Liability Act, a statute of the United States approved on the 22nd day of April, 1908, especially in its construction of Secs. 1, 3, 4 and 5.

That by this error the Supreme Court of North Carolina decided against the rights set up and claimed by your petitioner under the statute above referred to.

The said errors are more particularly set forth as follows:

First. The Supreme Court of North Carolina erred, and its decision was against the rights set up and claimed by your petitioner under Sec. 4 of the Act in question, because of the holdings of the Supreme Court of North Carolina in construing this Act, and because of sustaining certain instructions given and refused, upon the second issue which the Court submitted to the jury, namely that if the plaintiff was injured by the negligence of the defendant then did the plaintiff assume the risk of the injury?

158 1. For the Supreme Court of North Carolina in construing the Federal Employer's Liability Act of 1908 erred in holding that the Supreme Court of the United States holds that the employee assumes the ordinary risks incident to his employment, and that if he continues to work, without objection, having knowledge of a defect and an apprehension of danger, and is injured, that this is one of the ordinary risks of the employment. This is assigned as error for the reason that the Supreme Court of the United States holds that if a servant understands the condition of machinery and the dangers therefrom, or who is capable of doing so, and voluntarily in the course of employment exposes himself thereto, he assum-s the risk of injury therefrom, although the defect may have resulted from the negligence of the defendant and is an extraordinary risk of the employment.

2. For that the Supreme Court of North Carolina in construing the Federal Employer's Liability Act of 1908 erred in holding that the Supreme Court of the United States holds that negligence of the employer is an extraordinary risk which the employee does not assume, for the reason that the Supreme Court of the United States holds that a servant does assume the risk of injury from a danger

created by the negligence of the master, when the danger is known to the employee and he continues to work in the face of such danger without complaint and in the absence of a promise to remove the danger by remedying the defect.

3. For that the Supreme Court of North Carolina in construing the Federal Employer's Liability Act of 1908 erred in holding that the apparent conflict in the principles announced is reconciled by imposing upon the employee, if he wishes to be relieved from assumption of risk, the duty of making complaint when he knows of a defect, or could discover it by the exercise of *the of* ordinary
159 care, and by referring his conduct when he does complain to the principles of contributory negligence at least for a reasonable time, for the reason that in order to be relieved of assumption of risk the servant must report the defect of which he has knowledge and must be given a promise to repair by the master, and the servant must then continue the use of the defective instrument for a reasonable time, if he relies upon the promise to repair, and provided the danger is not so im-inent that a man of ordinary prudence would not continue to use the instrument, in which event the servant continues to assume the risk, and such assumption of risk is distinct from and independent of contributoary negligence.

4. For the the Supreme Court of North Carolina in construing the Federal Employer's Liability Act of 1908 erred in holding that the charge of the trial court was favorable to the defendant upon the issue of assumption of risk, for the reason that the charge fails to state correctly the principles of assumption of risk as they existed at common law and laid down by the United States Supreme Court.

5. For that the Supreme Court of North Carolina in construing the Federal Employer's Liability Act erred in refusing to hold that the trial court committed error and in holding that the trial court correctly instructed the jury as follows: "But if you find that he gave notice to the foreman of the round-house, and if you should find that the use of the water-gauge was not so obviously dangerous that a reasonably prudent man careful of himself not to get hurt while he was about his work and went on and used it he would not assume the risk, but if the danger was so apparent that a reasonably prudent man, careful of himself not to receive injury would see that he was in imminent danger and would observe by the use of it that he was endangering himself by going on and working with it, that
160 there was greater danger of getting hurt than otherwise, and he continued to work with it, he would be assuming the risk and responsibility, and it would be your duty to answer that issue "Yes." This was defendant's exception No. 55.

6. For that the Supreme Court of North Carolina in construing the Federal Employer's Liability Act of 1908 erred in refusing to hold that the trial court committed error and in holding that the trial court correctly instructed the jury as follows: "On the other hand the employer has the right to assume that his employee will go about the work in a reasonably safe way, and give due regard to the machinery and appliances which are in his hands and under his control, and if you should find from the evidence,

by its greater weight, because the burden in this instance is on the defendant, that the plaintiff knew of the absence of the guard or shield to the water gauge and failed to give notice to the defendant or to the agent whose duty it was to furnish the water gauge and appliance, and he continued to use it without giving that notice, it being furnished to him in a safe condition, then he assumes the risk incident to his work in the engine with the glass water gauge in that condition, although he might have handled his engine in every other respect with perfect care." This was defendant's exception No. 54.

7. For that the Supreme Court of North Carolina in construing the Federal Employer's Liability Act of 1908 erred in holding the third, fourth and fifth prayers for instructions were properly refused because directed to the second issue instead of to the third to which they were applicable, for the reason that the said instructions were properly directed to the issue of assumption of risk.

151 8. For that the Supreme Court of North Carolina erred in upholding the trial court in permitting the plaintiff, J. T. Horton, over the defendant's objection to testify that he told Mr. Mattrews, the day round-house foreman at Johnson Street, that "this guard glass was gone and asked him if he had one, and he said that they did not keep them in stock here, that they were made in Portsmouth and he would have to send to Portsmouth and get me one." This was defendant's exception No. 1.

9. For that the Supreme Court of North Carolina erred in refusing to hold that the trial court committed error in sustaining the plaintiff's objection to the following question asked the defendant's witness, P. M. Matthews, round-house foreman for the defendant: "Q. If this defect had been reported on the work report by engineman Horton, the absence of the guard glass, what would you have done?" this was defendant's exception No. 17.

10. For that the Supreme Court of North Carolina erred in upholding the trial court in refusing to give the defendant's request for special instructions to the jury, as follows: "The court charges you that if you believe the evidence the plaintiff assumes the risk of injury from the explosion of the water glass, and you will answer the second issue "Yes." This was defendant's exception No. 37.

11. For that the Supreme Court of North Carolina erred in upholding the trial court in refusing to give the defendant's request for special instructions to the jury as follows: "The Court charges you that the statute of North Carolina, Revisal Section 2646, abolishing assumption of risk as defense to any action brought against a railroad company by one of its employees, has no application in this case, and if you find that the plaintiff assumed the risk of injury from the explosion of the water glass, then you will answer the second issue 'Yes.'" This was defendant's exception No. 39.

162 12. For that the Supreme Court of North Carolina erred in upholding the trial court in refusing to give the following instructions as requested by defendant and in modifying it as set forth: "The right of the plaintiff to recover damages in this action is to be determined by the provisions of the Federal Employer's Liability Act enacted by Congress at the session of 1908, and the

Court charges you that if you find by a preponderance of evidence that the water glass on the engine on which plaintiff was employed was not provided with a guard glass and the condition of the glass was open and obvious and was fully known to the plaintiff and he continued to use such water glass with such knowledge and without objection, and that he knew the risk incident thereto, then the Court charges you that the plaintiff voluntarily assumed the risk incident to such use, and you will answer the second issue 'Yes.'"

The Court gave this instruction as applicable to the issue of contributory negligence, and instead of the words "Then the Court charges you that the plaintiff voluntarily assumed the risk incident to such use, and you will answer the second issue 'Yes,' used the words "then the Court charges you that the plaintiff is guilty of contributory negligence, and you will answer the third issue 'Yes.'"

To the refusal to give this instruction as requested and to the modification, defendant excepts. This was defendant's exception No. 40.

13. For that the Supreme Court of North Carolina erred in upholding the trial court in refusing to give the defendant's request for special instructions to the jury as follows: "If you find by the greater weight of the evidence that the water glass was defective, and that the plaintiff knew of the condition of the water glass on the engine and the danger incident to its use, and that there was open to him a safe way of operating the said engine by using
163 the gauge cocks, and that he voluntarily used the water glass in operating the engine, the court charges you that the plaintiff assumed the risk of injury from the use of the water glass, and you will answer the second issue 'Yes.'" This was defendant's exception No. 41.

14. For that the Supreme Court of North Carolina erred in upholding the trial court in refusing to give the defendant's request for special instruction to the jury as follows: "If you answer the first issue 'Yes' the Court charges you that if you find by the preponderance of the evidence that the plaintiff knew of the condition of the water glass on the engine, and that he could have shut off the glass and operated his engine with safety by using the gauge cocks on the said engine, and that the plaintiff with such knowledge failed to shut off the glass and use the gauge cocks, then the Court charges you that the plaintiff assumed the risk of injury, and you will answer the second issue 'Yes.'" This was defendant's exception No. 42.

15. For that the Supreme Court of North Carolina erred in refusing to hold that the trial court committed error in instructing the jury as follows: "There has been no statute provided as applies to this glass water gauge which has been called to the atention of the Court, so that leaves it open to the rights which the plaintiff might have under the law of this State, and the question of assumed risk, as has been argued by one, if not more of counsel, grows out of the contractual relation between plaintiff and defendant." This was defendant's exception No. 50.

16. For that the Supreme Court of North Carolina erred in upholding the trial court in instructing the jury as follows: "He does

not assume the risk incident to the negligence of his employer in providing machinery and appliances with which he has to work."
This was defendant's exception No. 53.

164 17. For that the Supreme Court of North Carolina erred in upholding the trial court in instructing the jury as follows: "And the same rule applies if the use of the glass without the shield was not so obviously dangerous as to cause a reasonably prudent man to stop the use of it, his going on and using it, of itself, would not be assuming the risk in the use of it." This was defendant's exception No. 57.

18. For that the Supreme Court of North Carolina erred in upholding the trial court in instructing the jury as follows: "If it was so obviously dangerous that a reasonably prudent man would not use it, and he continued to use it instead of using the other, he would assume the risk." This was defendant's exception No. 58.

19. For that the Supreme Court of North Carolina erred in upholding the trial court in instructing the jury as follows on the issue of contributory negligence: "That is governed largely by the same rules as applied to the question of assumption of risk. Did he continue to use the glass gauge when it was so obviously dangerous that a reasonably prudent man careful of himself would not do it? Was the danger so apparent that a reasonably prudent man would cease to use that and use the other gauge? If so, it would be your duty to answer the third issue 'Yes.'" This was defendant's exception No. 59.

20. For that the Supreme Court of North Carolina erred in refusing to hold that the trial court committed error in upholding the trial court in instructing the jury as follows: "If you find by the preponderance of the evidence that the water glass by which the plaintiff was injured was not provided with a guard glass and the condition of the water glass was open and obvious, and was fully know- to the plaintiff, and he continued to use such water glass with such knowledge and without objection, and knew the

165 risk incident thereto, then the Court charges you that the plaintiff was guilty of contributory negligence, and you will answer the third issue 'Yes.'" This was defendant's exception No. 66.

Second. The Supreme Court of North Carolina erred, and its decision was against the rights set up and claimed by your petitioner under Sec. 3 of the Act in question, because of certain instructions given upon the fourth issue which the Court submitted to the jury, namely, if the jury decided that the plaintiff by his negligence contributed to his injury, then what damage, if any, is the plaintiff entitled to?

21. For that the Supreme Court of North Carolina erred in upholding the trial court in instructing the jury as follows: "But if you should answer the third issue 'Yes' that the plaintiff was guilty of contributory negligence, then the defendant would be entitled to have a set off against any damages which he otherwise might recover. But if you answer it 'No', then give him the full measure of his injuries." This was defendant's exception No. 62.

22. For that the Supreme Court of North Carolina erred in up-

holding the trial court in instructing the jury as follows: "If you come to the question of damages, it is your duty in assessing damages to give the plaintiff a just compensation for the injury which he has received to compensate him for the physical and mental pain and suffering occasioned by the injury, if any, the loss of time, if any, resulting from injury, his lessened capacity, if any, to earn a livelihood, the probable extent and duration of his injury, its consequence upon his earning capacity and suffering, whether his suffering is to continue or not; and in one sum you will estimate his damages in dollars and cents, from which you will deduct, if you find he is guilty of contributory negligence, such amount as in your judgment should be deducted on that account from his actual damages." This was defendant's exception No. 63.

166 23. For that the Supreme Court of North Carolina erred in upholding the trial court in instructing the jury as follows: "It is a duty that the master owes his servants to furnish reasonably safe implements and machinery for the use of his servants while in his employ, and he can not absolve himself from this duty. If the jury should find from the evidence that the defendant failed to furnish the water glass to the plaintiff as it was his duty to do in the operation of his engine and in consequence of which, if the jury should find from the evidence that the plaintiff was injured by the negligent construction and provision of the water glass, as alleged in the complaint, you should answer the first issue 'Yes', but if the jury should find from the evidence that the water glass furnished by the defendant was safe and sound and such as was in general use, and that the injury of the plaintiff was caused by his own negligent use thereof, you should answer the first issue 'No', but if you should find from the evidence that the cause of the injury was in the construction and provision of the water glass, and also in the negligent use of the same by the plaintiff, then you should answer the first issue 'Yes', and shall diminish the amount of damages so found by them in proportion to the amount of negligence, which, under the evidence, is attributable to the plaintiff." This was defendant's exception No. 65.

Third. The Supreme Court of North Carolina erred and its decision was against the right set up and claimed by your petitioner under Sec. 1 of the Act in question, because of certain holdings of the Court and of certain instructions given upon the first issue which the Court submitted to the jury, namely, was the plaintiff injured by the negligence of the defendant?

24. For that the Supreme Court of North Carolina in construing the Federal Employer's Liability Act of 1908 erred in holding that the Supreme Court of the United States enforces the rule that it is the duty of the employer to provide reasonably safe and ade-

167 quate machinery and appliances for the use of the employee and to keep and maintain them in such condition and that a failure to perform this duty is negligence, for the reason that the master is only bound to exercise the care which the exigency reasonably demands in furnishing such appliances as are adequate and suitable and in keeping and maintaining them in such condition as to be reasonably safe for use.

25. For that the Supreme Court of North Carolina erred in upholding the trial court in refusing to give the defendant's request for special instructions as follows: "The Court charges you that if you believe — the evidence the plaintiff was not injured by any negligence on the part of the defendant, *and* you will answer the first issue 'No' ". This was defendant's exception No. 36.

26. For that the Supreme Court of North Carolina erred in refusing to hold that the trial court committed error in instructing the jury as follows: "It is the duty of the defendant to provide a reasonably safe place for the plaintiff to work and to furnish him with reasonably safe appliances with which to do his work." This was defendant's exception No. 44.

27. For that the Supreme Court of North Carolina erred in refusing to hold that the trial court committed error in instructing the jury as follows: "It is the duty of the defendant to furnish the plaintiff with such reasonably safe appliances as are approved and in general use for that class of work, and if the defendant furnished him a glass water gauge, without safety appliances, and the safety appliance was in general use for that kind of gauge, and was wanting at the time defendant gave him his engine, and was not supplied while he was operating the engine, then he did not have a reasonably safe place to work, and if you so find from the evidence by its greater weight that he was injured while operating his engine with the safety shield or guard absent, and that that was the proximate cause
168 of his injury, it would be your duty to answer the first issue 'Yes' ". This was defendant's exception No. 45.

28. For that the Supreme Court of North Carolina erred in refusing to hold that the trial court committed error in instructing the jury as follows: "If you find from the evidence that it was turned over to him without the guard, and if you further find from the evidence that the guard was a proper safety provision, for the use of that *guage*, and that it was unsafe without it, then the defendant did not furnish him a safe place, and a safe appliance to do his work, and if it remained in that condition it was continuing negligence on the part of the defendant, and if he was injured in consequence thereof, if you should so find by the greater weight of the evidence you should answer the first issue 'Yes.' " This was defendant's exception No. 47.

29. For that the Supreme Court of North Carolina erred in upholding the trial court in charging the jury as follows: "If you should find from the evidence that he gave notice when he came back to the foreman of the round-house, the place where it was his duty to make known the absence of the guard glass, and was then told that there was none on hand, and to go on and use it, and he went on with that engine in that condition and used it and in consequence of using the engine with the glass water gauge in that condition he received his injury, then at the time he received the injury he was not in a safe place to work, and if he was injured in consequence thereof and if you should so find from the evidence by the greater weight, you should answer the first issue 'Yes.' " This was defendant's exception No. 48.

30. For that the Supreme Court of North Carolina erred in upholding the trial court in instructing the jury as follows: "It is the duty of the defendant under this act to furnish the plaintiff
169 safe, sound and suitable machinery, such as was reasonably safe, if the jury should find from the evidence that the defendant negligently furnished plaintiff an unsafe and unsound water glass, as described in the complaint, and the plaintiff was injured on account of such negligent failure to furnish such safe and sound water glass, you will answer the first issue 'Yes' ", provided you find that he was injured and that the failure to furnish this safe water glass was the proximate cause of the injury." This was defendant's exception No. 64.

Fourth. The Supreme Court of North Carolina erred, and its decision was against the rights set up and claimed by your petitioner under the Federal Employer's Liability Act in the following particulars:

31. For that the Supreme Court of North Carolina erred in rendering the final judgment rendered against the defendant, the Seaboard Air Line Railway, and which is complained of in this case.

32. For that the Supreme Court of North Carolina erred in refusing to hold that the trial court committed error and in sustaining the action of the trial court in over-ruling defendant's motion at the conclusion of plaintiff's evidence and at the conclusion of all the evidence for judgment of non-suit and to dismiss the action. Defendant's exceptions Nos. 15 and 35.

33. For that the Supreme Court of North Carolina erred in upholding the trial court in instructing the jury with reference to the Federal Employer's Liability Act as follows: "If it is in conflict with the State law, the State law is superceded, but where there is no conflict expressed by the statute of the United States, then the rule of the State prevails." This was defendant's exception No. 49.

34. For that the Supreme Court of North Carolina erred in
170 refusing to hold that the trial court committed error in refusing defendant's motion for judgment non obstante veredicto. This was defendant's exception No. 67.

For which errors the plaintiff in error, The Seaboard Air Line Railway, prays that the said judgment of the Supreme Court of North Carolina, dated to-wit May 28, 1913, be reversed, and a judgment rendered in favor of the plaintiff in error, and for costs.

BENJAMIN MICOU,
MURRAY ALLEN,
Counsel for Plaintiff in Error.

171 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of North Carolina, Greeting:

[Seal of the Supreme Court of the United States.]

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court, before

you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between James T. Horton, plaintiff, and Seaboard Air Line Railway, defendant, wherein was drawn in question the validity of a treaty or statute, of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the
172 construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said defendant, Seaboard Air Line Railway, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 4th day of August, in the year of our Lord one thousand nine hundred and thirteen.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by
J. R. LAMAR,
Associate Justice of the Supreme Court of the United States.

Filed Aug. 5, 1913, in Supreme Court, North Carolina.

173 UNITED STATES OF AMERICA, *ss:*

To James T. Horton, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Supreme Court of the State of North Carolina, wherein Seaboard Air Line Railway is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment

rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable J. R. Lamar, Associate Justice of the Supreme Court of the United States, this 4th day of August, in the year of our Lord one thousand nine hundred and thirteen.

J. R. LAMAR,
Associate Justice Supreme Court of the United States.

174 On this 7th day of August, in the year of our Lord one thousand nine hundred and thirteen, personally appeared before me, the subscriber, R. W. Ward office Deputy Marshal and makes oath that he delivered a true copy of the within citation to James T. Horton at Raleigh, N. C.

R. W. WARD.

Fees & Ex. $2.50.

Sworn to and subscribed the 7th day of August, A. D. 1913.

[Seal Chas. D. Wildes, Notary Public, Raleigh, Wake Co., N. C.]

CHAS. D. WILDES,
Notary Public.

My commission expires Mc'h 1st, 1914.

[Endorsed:] #1446. Ward. Seaboard Air Line Railway, Plaintiff in Error, vs. James T. Horton, Defendant in Error. Citation. Original. Office of U. S. Marshal, Raleigh, N. C., Aug. 7, 1913. Fees & Ex. $2.50.

175 The Supreme Court of North Carolina.

SEABOARD AIR LINE RAILWAY, Paintiff in Error,
vs.
JAMES T. HORTON, Defendant in Error.

Bond.

Know all men by these presents that we, Seaboard Air Line Railway, a corporation of the State of Virginia and other states, the principal office of which is in the city of Portsmouth, in the said State, as principal, and Fidelity & Deposit Company of Maryland, as surety, are held and firmly bound unto James T. Horton of the State of North Carolina, in the full and just sum of Fifteen Thousand Dollars for the payment of which sum, well and truly to be made, we hereby jointly and severally bind ourselves and each of our successors firmly by these presents.

Sealed with our seals and dated this 11th day of July, in the year 1913.

Whereas lately at a hearing had before the Supreme Court of North Carolina, in a suit pending in said court between the said

James T. Horton as plaintiff and said Seaboard Air Line Railway as defendant, a final judgment was rendered against the said Seaboard Air Line Railway, and said Seaboard Air Line Railway seeks to prosecute its writ of error to the Supreme Court of the United States to reverse said final judgment:

Now, therefore, the condition of this obligation is such that if the said Seaboard Air Line Railway, as plaintiff in error, shall prosecute its said writ of error, and answer all costs and damages that may be adjudged against it if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and effect.

SEABOARD AIR LINE RAILWAY, [SEAL.]
By MURRAY ALLEN, *Attorney.*
FIDELITY & DEPOSIT CO. OF MD.,
[SEAL.] By JOSEPH B. CHESHIRE, *Attorney-in-Fact.*
J. L. SKINNER, *Agent.*

Bond approved and to act as supersedeas.

J. R. LAMAR,
Associate Justice Supreme Court of the United States.

176 Supreme Court of North Carolina.

I, J. L. Seawell, Clerk of the Supreme Court of North Carolina, do hereby certify the foregoing to be a full, true and perfect copy of the transcript on file in this Court in the cause entitled James T. Horton against Seaboard Air Line Railway as appears from original on file in this office.

Given under my hand and the seal of said Court at office in Raleigh, this 15th day of August, 1913.

[Seal of the Supreme Court of the State of North Carolina.]

J. L. SEAWELL,
Clerk of the Supreme Court.

Endorsed on cover: File No. 23,842. North Carolina Supreme Court. Term No. 691. Seaboard Air Line Railway, plaintiff in error, vs. James T. Horton. Filed August 27th, 1913. File No. 23,842.

Office Supreme Court, U. S.
FILED
FEB 24 1914
JAMES D. MAHER

IN THE

Supreme Court of the United States

OCTOBER TERM, 1913

SEABOARD AIR LINE RAILWAY
Plaintiff in Error
v.
JAMES T. HORTON
Defendant in Error

No. 691

Supplemental Brief of Defendant in Error

WILLIAM C. DOUGLASS,
CLYDE A. DOUGLASS,
Counsel for Defendant in Error.

COMMERCIAL PRINTING COMPANY, RALEIGH, N. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1913

SEABOARD AIR LINE RAILWAY,
Plaintiff in Error.

v.

JAMES T. HORTON,
Defendant in Error.

No. 691

ON WRIT OF ERROR TO THE SUPREME COURT OF NORTH CAROLINA.

SUPPLEMENTAL BRIEF OF DEFENDANT IN ERROR

The Plaintiff in Error was accorded the Defense of Assumption of Risk, when it was not entitled thereto.

In the Federal Employers Liability Act, Congress only partially covered the field of Master and Servant. It legislated, among other things, on the question of contributory negligence; also upon assumption of risk, when the proximate cause of the injury is traceable to the violation of certain statutes. Upon the question of *Common Law assumption of risk*, as distinguished from the cases mentioned in Section 4 of said Act, the Congress has left the field open. So that, in the States where assumption of risk is a defense, the law of such States is so qualified as to eliminate the defense of assumption of risk in the cases mentioned in Section 4. The

Laws of North Carolina, as declared in the brief of Plaintiff in Error (page 29), have abolished assumption of risk as a defense, and as before stated, Congress, in the Act under consideration having left open this part of the field, the State Law governs and assumption of risk can in no case be pleaded in an action brought under the Act in the State Courts of North Carolina. This is in accord with the concurring opinion of Chief Justice Clark, page 87, of printed record.

In the case of *Chicago, etc. Ry. v. Solan,* 169 U. S.; 42 L. E. 688, the court in construing a State statute prohibiting contracts to exempt a railroad company from liability as a common carrier, held that such statutes were not in any just sense *regulations of commerce,* and were not void as to interstate business, using the following language:

> "The statute now in question, so far as it concerns liability for injuries happening within the State of Iowa—which is the only matter presented for decision in this case—clearly comes within the same principles. It is in no just sense *a regulation of commerce.* It does not undertake to impose any tax upon the company, or restrict the persons or things to be carried, or to regulate the rate of tolls, fares or freight. Its whole object and effect are to make it more sure that the railroad companies shall perform the duty resting upon them by virtue of their employment as common carriers, to use the utmost care and diligence in the transportation of passengers and goods."

And to the same effect are the following cases:

Sherlock v. Alling, 93 U. S., 99; 23 L. E., 819.
Smith v. Alabama, 124 U. S.; 31 L. E., 508.
Railroad Co. v. Alabama, 128 U. S.; 32 L. E., 352.
R. R. Co. v. King, 217 U. S.; 54 L. E., 868.

In earnestly seeking to give the Employers Liability Act such construction as will accord with the intention of Congress, taking the whole Act into consideration, we desire to call the attention of the Court to the following: Section 2 reads as follows:

> "That any common carrier by railroad—shall be liable in damages to any person suffering injury while he is employed by such carrier—for such injury—resulting in whole or in part by reason of any deficiency, due to its negligence in its cars, engines, etc."
>
> Section 4. "* * * Such employer shall not be held to have assumed the risks of his employment in any case when the violation by such common carrier of any statute enacted for the safety of the employees contributed to the injury."

Section 4 creates a liability not theretofore provided for in the Act. There are instances of violation of statutes, which cannot be said to be negligent *per se*, but are made so by section 4. Take for instance the Safety Appliance Act in relation to Automatic Couplers; there might not be any *defect* or *insufficiency* in the ordinary acceptance of these legal terms, inherent in a particular kind of coupler forbidden by the Statute, yet under section 4, if the use of such coupler contributed to the injury of the employee, he is held, even in such case, not to have assumed any risk. This would be an instance when an employee is injured, without the negligence of a fellow servant or defects or insufficiency of the appliances, etc., and would give the injured servant a cause of action by fair implication, regardless of other parts of the Act.

Under the plain reading of section 2 of the Act under consideration, how can an employee assume the risk of an injury resulting in whole or in part, from the negligence of the

Railroad Company on account of insufficiency in its cars, engines, appliances or machinery?

The act itself places on the Railroad Company the burden of keeping its machinery and appliances in safe condition, and under section 5 of the act no contract, rule, regulation or device whatever, can exempt the carrier from this liability.

It seems to us that under the act, the liability of the carrier is fully determined when a jury shall find that the employee has been injured by the negligence of the carrier in any of the particulars mentioned in the second section and that the only defense open is the negligence of the employee.

The Writ of Error should be dismissed:

1st. Because no day certain is named in either the Citation or Writ of Error.

2nd. Because Assumption of Risk is a Common Law defense, and not a *creation of the Federal power,* and the State Court had the right to administer the Common Law according to its own understanding and interpretation and is not amenable to review in this court.

3rd. That Congress, not having acted on the question of Common Law Assumption of Risk, the State law is operative, and under the laws of North Carolina Assumption of Risk is not a defense.

4th. The only effect of Section 4 is to create a new liability of the railroad to the employee, by fair implication, and does not have the effect of authorizing the defense of Common Law Assumption of Risk.

5th. The question of Assumption of Risk was submitted to the Jury in the manner suggested by the Plaintiff in Error.

6th. If there was error in the instructions given the jury by the judge of the trial court (which we deny), the error was invited by the Plaintiff in Error.

THE PLAINTIFF IN ERROR HAD THE FULL BENEFIT OF THE DEFENSE OF ASSUMPTION OF RISK IN THE TRIAL COURT. IT WAS ALLOWED TO INTRODUCE EVIDENCE TO SUSTAIN ITS PLEA, WAS DENIED NO PRAYER TO WHICH IT WAS ENTITLED, AND THE TRIAL JUDGE INSTRUCTED THE JURY FULLY AND FAIRLY ON THIS DEFENSE.

BELOW, WE SUBMIT ALL OF THE PLAINTIFF IN ERROR'S PRAYERS FOR SPECIAL INSTRUCTION, AND FOLLOW THE SAME BY THE CHARGE IN FULL AS GIVEN BY THE TRIAL JUDGE ON THIS ISSUE:

Plaintiff in Error's Prayers for Special Instruction on the Issue of Assumption of Risk.

"The Court charges you that the Statute of North Carolina, Revisal, Section 2646, abolishing assumption of risk as defense to an action brought against a railroad company by one of its employees, has no application in this case, and if you find that the plaintiff assumed the risk of injury from the explosion of the water glass, you will answer the second issue 'Yes.'"

"The right of the plaintiff to recover damages in this action is to be determined by the provisions of the Federal Employer's Liability Act enacted by Congress at the session of Congress of 1908, and the Court charges you that if you find by a preponderance of evidence that the water glass on the engine on which plaintiff was employed was not provided with a guard glass and the condition of the glass was open and obvious and was fully known to the plaintiff and he continued to use such

water glass with such knowledge and without objection, and that he knew the risk incident thereto, then the Court charges you that the plaintiff voluntarily assumed the risk incident to such use, and you will answer the second issue 'Yes.'"

"If you find by the greater weight of the evidence that the water glass was defective, and that the plaintiff knew of the condition of the water glass on the engine, and the danger incident to its use, and that there was open to him a safe way of operating the said engine by using the gauge cocks, and that he voluntarily used the water glass in operating the engine, the Court charges you that the plaintiff assumed the risk of injury from the use of the water glass, and you will answer the second issue 'Yes.'

"If you answer the first issue 'Yes,' then the Court charges you that if you find by the preponderance of the evidence that the plaintiff knew of the condition of the water glass on the engine and that he could have shut off the glass and operated his engine with safety by using the gauge cocks on the said engine, and that the plaintiff, with such knowledge, failed to shut off the glass and use the gauge cocks, then the Court charges you that the plaintiff assumed the risk of injury, and you will answer the second issue 'Yes.'

"If you answer the first issue 'Yes,' then the Court charges you that if you find by a preponderance of the evidence that the absence of the guard glass and water gauge was open and obvious and was fully known to the plaintiff, and he continued to use the said glass with such knowledge, and that the plaintiff reported the defect and was given a promise to repair, and you further find that the plaintiff knew and appreciated the danger incident

thereto, and that the danger was so obvious that a man of ordinary prudence would not have continued to use the gauge without the guard glass, then the Court charges you that the plaintiff assumed the risk, and you will answer the second issue 'Yes.'

Instructions of the Trial Judge on the Issue of Assumption of Risk.

"A man assumes the risk, when he takes employment, incident to the class of work he has to perform.

"Some classes of work are more dangerous than others. The position of a locomotive engineer might well be regarded as more hazardous than other employments, therefore he assumes the risk of that employment, but he has the right when he enters into employment of that class of work to assume that his employer has done what the law requires it to do in providing him a reasonably safe place to work, with reasonably safe appliances with which to do his work, consistent with the character of the work which is to be performed.

"He does not assume the risk incident to the negligence of his employer in providing machinery and appliances with which he has to work.

"On the other hand the employer has the right to assume that his employee will go about the work in a reasonably safe way, and give due regard to the machinery and appliances which are in his hands and under his control, and if you should find from the evidence, by its greater weight, because the burden in this instance is on the defendant, that the plaintiff knew of the absence of the guard or shield to the water gauge and failed to give notice to the defendant or to the agent whose

duty it was to furnish the water gauge and appliance, and he continued to use it without giving that notice, it being furnished to him in a safe condition, then he assumed the risk incident to his work in the engine with the glass water gauge in that condition, although he might have handled his engine in every other respect with perfect care.

"But if you find that he gave notice to the foreman of the roundhouse, and if you should find that the use of the water gauge was not so obviously dangerous that a reasonably prudent man, careful of himself not to get hurt while he was about his work and went on and used it, he would not assume the risk, but if the danger was so apparent that a reasonably prudent man, careful of himself not to receive injury, would see that he was in imminent danger and would observe by the use of it that he was endangering himself by going on and working with it, that there was greater danger of getting hurt than otherwise, and he continued to work with it, he would be assuming the risk and responsibility, and it would be your duty to answer that issue 'Yes.'

"If it was received in good condition and he failed to give notice, and if he did work with it in its present condition, without the shield or guard, he then assumed the risk. How was that? It is a question of evidence for you. Did he give the notice? Did he assume the risk by failing to give notice, keeping the knowledge of the absence of the guard glass within his own breast? You have heard the testimony on both sides. The plaintiff contends that it was dangerous, and that it was not reasonably safe, because the very safety which experience found necessary was to have that shield or guard, one which was provided for that glass

or gauge, which would make it safe. Therefore, he insists that it was dangerous in not being provided with a shield. He insists that it was not so obviously dangerous that the accident of these glass tubes bursting did not occur so frequently but what a reasonably prudent man might go on with the work without realizing that he was likely to be hurt, or more likely to be hurt than not. On the other hand defendant contends that if he did give notice and continued to run on his own judgment, he assumed the risk; that if he did give the notice he should have known that it was so obviously dangerous that he should have declined to use it. And there is another rule which is insisted upon by the plaintiff and the defendant, and in which they conflict in their views. The defendant contends that the engine was not only supplied with the water gauge, but that there was another water gauge provided and by that the engine could be safely run. Defendant says that if you should find the glass was unsafe, that there was a safe way provided by the other water gauge; and the defendant insists that a reasonably prudent man would have seen the absence of this shield, and that it was his duty for his own safety to shut off the glass gauge and use the other one, and that in failing to do so he took the risk and assumed the responsibility and risk in continuing the use of the glass gauge without the shield.

"And the same rule applies if the use of the glass without the shield was not so obviously dangerous as to cause a reasonably prudent man to stop the use of it, his going on and using it, of itself, would not be assuming the risk in the use of it.

"If it was so obviously dangerous that a reasonably prudent man would not use it, and he contin-

ued to use it instead of using the other, he would assume the risk.

"If you answer the first issue 'Yes,' then the Court charges you that if you find by the preponderance of the evidence that the absence of the guard glass and water gauge was open and obvious, and was fully known to the plaintiff, and he continued to use the said glass with such knowledge, and that the plaintiff reported the defect and was given a promise to repair, and you further find that the plaintiff knew and appreciated the danger incident thereto, and that the danger was so obvious that a man of ordinary prudence would not have continued to use the gauge without the guard glass, then the Court charges you that the plaintiff assumed the risk, and you will answer the second issue 'Yes.'"

The charge should be considered as a whole.

The Plaintiff in Error, in its brief, attempts to dissect the charge of the trial Judge, and to the dissected parts thereof gives undue emphasis. The charge should be taken as a whole, and when thus taken it will appear that it meets all of the objections in Plaintiff in Error's brief and will further show that the case was presented to the jury favorably to the Plaintiff in Error and substantially under the theory advanced by it. It can be readily seen that the Plaintiff in Error obtained a more favorable charge on the issue of *assumption of risk* than it was entitled to under the law.

The refusal to grant special requests to charge is not error, when their substance is embraced in the instructions actually given.

Northern P. R. Co. v. Urlin, 158 U. S., 271.
Railroad Co. v. Leak, 163 U. S., 280.
Laber v. Cooper, 7 Wall., 565.
Mining Co. v. Cheeseman, 116 U. S., 529.

Insurance Co. v. Ursur, 144 U. S., 439.
Ayers v. Watson, 113 U. S., 594.

Respectfully submitted,
WILLIAM C. DOUGLASS,
CLYDE A. DOUGLASS,
Counsel for Defendant in Error.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1913

SEABOARD AIR LINE RAILWAY,
Plaintiff in Error.

v.

JAMES T. HORTON,
Defendant in Error.

No. 691

BRIEF OF PLAINTIFF IN ERROR.

PRESENT STATUS OF CASE.

The case comes to this Court from the Supreme Court of North Carolina upon a writ of error allowed by Mr. Justice Lamar (page 110, record).

Motion was made by the defendant in error to dismiss the writ or affirm the opinion and judgment of the Supreme Court of North Carolina, and to transfer said cause to the summary docket.

On the 15th day of December, 1913, this Court ordered the case to the summary docket, and it now comes up on that docket for hearing.

In reply to the defendant in error's motion, above referred to, plaintiff in error filed a brief which, in connection with what is herein contained, it is requested shall be taken as the brief on the merits.

The brief already on file contains a full statement of the case (pages 1 to 9), discusses fully the question of jurisdiction and the errors in instructions given which deny the plaintiff in error a proper construction of the Federal Employers' Liability Act,

and the brief also contains a full discussion of error in the refusal to give instructions requested by plaintiff in error and refused by the trial court. The errors discussed, and those discussed herein, were presented to the Supreme Court of North Carolina, and the action of the trial court was affirmed.

Here we will specify the errors relied on, and either discussed in the brief already on file or discussed herein.

Specifications of Errors.

The said errors are particularly set forth as follows:

First. The Supreme Court of North Carolina erred, and its decision was against the rights set up and claimed by your petitioner under Sec. 4 of the Act in question, because of the holdings of the Supreme Court of North Carolina in construing this Act, and because of sustaining certain instructions given and refused, upon the second issue which the Court submitted to the jury, namely, that if the plaintiff was injured by the negligence of the defendant then did the plaintiff assume the risk of the injury?

1. For that the Supreme Court of North Carolina in construing the Federal Employers' Liability Act of 1908 erred in holding that the Supreme Court of the United States holds that the employee assumes the ordinary risks incident to his employment, and that if he continues to work, without objection, having knowledge of a defect and an apprehension of danger, and is injured, that this is one of the ordinary risks of the employment. This is assigned as error for the reason that the Supreme Court of the United States holds that if a servant understands the condition of machinery and the dangers therefrom, or who is capable of doing so, and voluntarily in the course of employment exposes himself thereto, he assumes the risk of injury therefrom, although the defect may have resulted from the negligence of the defendant and is an extraordinary risk of the employment.

2. For that the Supreme Court of North Carolina in construing the Federal Employers' Liability Act of 1908 erred in hold-

ing that the Supreme Court of the United States holds that negligence of the employer is an extraordinary risk which the employee does not assume, for the reason that the Supreme Court of the United States holds that a servant does assume the risk of injury from a danger created by the negligence of the master, when the danger is known to the employee and he continues to work in the face of such danger without complaint and in the absence of a promise to remove the danger by remedying the defect.

3. For that the Supreme Court of North Carolina in construing the Federal Employers' Liability Act of 1908 erred in holding that the apparent conflict in the principles announced is reconciled by imposing upon the employee, if he wishes to be relieved from assumption of risk, the duty of making complaint when he knows of a defect, or could discover it by the exercise of ordinary care, and by referring his conduct when he does complain to the principles of contributory negligence at least for a reasonable time, for the reason that in order to be relieved of assumption of risk the servant must report the defect of which he has knowledge and must be given a promise to repair by the master, and the servant must then continue the use of the defective instrument for a reasonable time, if he relies upon the promise to repair, and provided the danger is not so imminent that a man of ordinary prudence would not continue to use the instrument, in which event the servant continues to assume the risk, and such assumption of risk is distinct from and independent of contributory negligence.

4. For that the Supreme Court of North Carolina in construing the Federal Employers' Liability Act of 1908 erred in holding that the charge of the trial court was favorable to the defendant upon the issue of assumption of risk, for the reason that the charge fails to state correctly the principles of assumption of risk as they existed at common law and as laid down by the United States Supreme Court.

5. For that the Court permitted the plaintiff J. T. Horton, over the defendant's objection, to testify that he told Mr. Mat-

thews, the day roundhouse foreman at Johnson Street, that his guard glass was gone and asked him if he had one, and he said that they did not keep them in stock here, that they were made in Portsmouth, and he would have to send to Portsmouth to get one, to run her like she was. He said he would send to Portsmouth and get me one. This is defendant's exception No. 1. (Record, page 12.)

6. For that the Court refused to strike out the words: "It's no use," as used by the plaintiff in answer to the following question: "Q. Have you applied for any job to run a locomotive engine?" A. "No, sir; it's no use." Defendant objects to the language "it's no use," and asked the Court to strike it out. This is defendant's exception No. 5. (Record, page 14.)

7. For that the Court admitted the following evidence over the defendant's objection: "Q. State if you have any mental suffering on account of your injury?" A. "Yes; I worry day and night because I cannot follow my chosen occupation; I can't make half the money I did make." This is defendant's exception No. 6. (Record, page 14.)

8. For that the Court refused to strike out the witness' answer to the question shown in assignment of error No. 6 upon defendant's motion to strike it out. This is defendant's exception No. 7. (Record, page 14.)

9. For that the Court admitted the following evidence over the defendant's objection: "State what the duties of those inspectors were, if you know." A. "It was their duty to inspect the engine from the ground up; they make out a report on each engine, that would include an inspection of the water glass." This is defendant's exception No. 8. (Record, page 14.)

9. For that the Court refused, upon objection by the plaintiff, to permit the plaintiff to read to the jury rule 668 from rule book of the defendant company governing its employees, as he was requested to do by the defendant. This is defendant's exception No. 9. (Record, page 15.)

11. For that in the course of the examination of the plaintiff with respect to his testimony at the former trial of this case,

the Court sustained the plaintiff's objection to the following question: "Did you find anything in there about Matthews telling you about going ahead with the engine? State if you can find it anywhere in there." This is defendant's exception No. 10. (Record, page 16.)

12. For that the Court permitted the plaintiff over defendant's objection to testify in regard to the circumstances under which he signed the release for injury received in 1903, as follows: "I started to say Mr. Baldwin came up to me in front of King-Crowell Drug Store." This is defendant's exception No. 11. (Record, page 18.)

13. For that the Court permitted the plaintiff to testify over defendant's objection and refused to strike out testimony as follows: "He (Baldwin) was detective for the Seaboard, and said he was going to pay me for my time." I said I did not want pay. He asid that he had been to see the doctor and he said there was nothing the matter with my eye, that it was just irritated. I lost four days, it amounted to $8 to $10, probably $15. I signed it and in about thirty days they gave me a voucher for about $8 or $10, certainly not over $15. This is defendant's objection No. 12. (Record, page 18.)

14. For that the Court refused over defendant's objection to strike out the following words used by plaintiff in answer to the question as to what effort he had made to get employment with any other road: "It is no use, just a waste of time and money to go and see about it." This is defendant's exception No. 13. (Record, page 18.)

15. For that the Court sustained the plaintiff's objection when defendant asked the witness M. C. Horton, an expert offered by the plaintiff, if a very large number of people did not have astigmatism. This is defendant's exception No. 14. (Record, page 19.)

16. For that the Court refused to sustain the defendant's motion for judgment of nonsuit, and to dismiss the action made at the conclusion of plaintiff's evidence. This is defendant's exception No. 15. (Record, page 20.)

17. For that the Court permitted the plaintiff to ask defend-

ant's witness, M. S. Benton, the following question: "How much do you get paid to come here and testify?" This is defendant's exception No. 16. (Record, page 25.)

18. For that the Court sustained the plaintiff's objection to the following question asked the defendant's witness P. M. Matthews, roundhouse foreman for the defendant: "Q. If this defect had been reported on the work report by engineman Horton, the absence of the guard glass, what would you have done?" This is defendant's exception No. 17. (Record, page 26.)

19. For that the Court permitted the plaintiff's witness J. A. Massey, over the defendant's objection to testify as follows: "Q. I want you to state to the jury if you know what the custom and practice was in respect to engineers obtaining supplies for their locomotives?" "A. It was customary for engineers when they wanted to get supplies out of the store-room, to go to the general foreman and get a requisition for whatever they wanted." This is defendant's exception No. 23. (Record, page 40.)

20. For that the Court permitted the plaintiff's witness E. C. Horton, to testify in regard to the condition of the water glass on engine 752 which was used by the plaintiff, as follows, over defendant's objection: "How was it on the trip just after the injury?" "A. It had a little thin glass in that shield there, it was very greasy from machinists handling it so that I couldn't see the water tube to locate the water level in the boiler, and I taken it out and cleaned it. It was so thin it shook this way (indicating.) When I got to Cary I cut wedges and stuck in here to steady the glass to keep it from jarring back and forth in the grooves of the shield. When I discovered that the glass was out of here when I made this trip, I went to the foreman and told him that there was no shield glass. This is defendant's exception No. 24. (Record, page 41.)

21. For that the Court refused upon defendant's motion to strike out the answer of the witness E. C. Horton, to question shown in assignment of error number 25. This is defendant's exception No. 25. (Record, page 41.)

22. For that the Court permitted the plaintiff's witness E. C. Horton, over the defendant's objection to testify as follows:

"Q. What was the custom and practice down there when a shield to the guard glass or tube or any part of the engine was missing in the cab?" "A. The inner tube—there would be a machinist's report, but as to that shield glass there, I could get a requisition and go to the store-room and get it and drop it down. Anybody could drop one just as you are doing that now. I would apply to the foreman for requisitions verbally." This is defendant's exception No. 26. (Record, page 41.)

23. For that the Court permitted the plaintiff's witness E. C. Horton, over the defendant's objection, to testify as follows: "Q. State if it was the practice of engineers down there to run their engines without the guard glass at all?" "A. As to that special kind, I only run this engine with that, but the old shields that we did run without any guard glass on." This is defendant's exception No. 27. (Record, page 42.)

24. For that the Court refused upon defendant's motion to strike out witness' answer to question shown in assignment of error number 28. This is defendant's exception No. 28. (Record, page 42.)

25. For that the Court permitted the plaintiff's witness E. C. Horton, over defendant's objection, to testify as follows: "Q. State what was the duty of the engineer if he found the guard glass gone, whether or not it was his duty to shut off the guard glass and run with the guage cocks?" "A. I never did do it." This is defendant's exception No. 29. (Record, page 42.)

26. For that the Court refused upon defendant's motion to strike out the answer of the witness to the question shown in the assignment of errors number 30. This is defendant's exception No. 30. (Record, page 42.)

27. For that the Court permitted the plaintiff's witness Dr. A. W. Goodwin, to testify as follows, over defendant's objection: "Q. In your opinion could a man with an eye like that pass the examination that you put to this man?" "A. I don't think he could have read the print I showed him." This is defendant's exception No. 34. (Record, page 47.)

28. For that the Court refused the defendant's motion for judgment of nonsuit under the Hinsdale Act, and to dismiss the

action at the conclusion of all the evidence and overruled the defendant's motion. This is defendant's exception No. 35. (Record, page 49.)

29. For that the Court refused to give the defendant's request for special instructions, as follows: "The Court charges you that if you believe the evidence the plaintiff was not injured by any negligence on the part of the defendant, and you will answer the first issue "No." This is defendant's exception No. 36. (Record, page 55.)

30. For that the Court refused to give the defendant's request for special instructions to the jury, as follows: "The Court charges you that if you believe the evidence the plaintiff assumed the risk of injury from the explosion of the water glass, and you will answer the second issue "Yes." This is defendant's exception No. 37. (Record, page 56.)

31. For that the Court refused to give the defendant's request for special instructions to the jury, as follows: "If you do not answer the second issue 'Yes,' then the Court charges you that if you believe the evidence the plaintiff, by his own negligence, contributed to his injury, and you will answer the third issue 'Yes.'" This is defendant's exception No. 38. (Record, page 56.)

32. For that the Court refused to give the defendant's request for special instructions to the jury as follows: "The Court charges you that the statute of North Carolina, Revisal Section 2646, abolishing assumption of risk as defense to an action brought against a railroad company, by one of its employees, has no application in this case, and if you find that the plaintiff assumed the risk of injury from the explosion of the water glass, then you will answer the second issue "Yes." This is defendant's exception No. 39. (Record, page 56.)

33. For that the defendant requested the Court to instruct the jury as follows: "The right of the plaintiff to recover damages in this action is to be determined by the provisions of the Federal Employer's Liability Act enacted by Congress at the session of 1908, and the Court charges you that if you find by a preponderance of evidence that the water glass on the engine on

which plaintiff was employed was not provided with a guard glass and the condition of the glass was open and obvious and was fully known to the plaintiff and he continued to use such water glass with such knowledge and without objection, and that he knew the risk incident thereto, then the Court charges you that the plaintiff voluntarily assumed the risk incident to such use, and you will answer the second issue "Yes."

The Court gave this instruction as applicable to the issue of contributory negligence, and instead of the words "then the Court charges you that the plaintiff voluntarily assumed the risk incident to such use, and you will answer the second issue "Yes," used the words, "then the Court charges you that the plaintiff is guilty of contributory negligence and you will answer the third issue "Yes." To the refusal to give this instruction as requested and the modification, the defendant excepts. Exception No. 40. (Record, page 56.)

34. For that the Court refused to give the defendant's request for special instructions to the jury as follows: "If you find by the greater weight of the evidence that the water glass was defective, and that the plaintiff knew of the condition of the water glass on the engine and the danger incident to its use, and that there was open to him a safe way of operating the said engine by using the gauge cocks, and that he voluntarily used the water glass in operating the engine, the Court charges you that the plaintiff assumed the risk of injury from the use of the water glass, and you will answer the second issue 'Yes.'" This is defendant's exception No. 41.

35. For that the Court refused to give the defendant's request for special instructions to the jury as follows: "If you answer the first issue 'Yes,' then the Court charges you that if you find by the preponderance of the evidence that the plaintiff knew of the condition of the water glass on the engine, and that he could have shut off the glass and operated his engine with safety by using the gauge cocks on the said engine, and that the plaintiff with such knowledge failed to shut off the glass and use the gauge cocks, then the Court charges you that the plaintiff as-

sumed the risk of injury, and you will answer the second issue 'Yes.'" This is defendant's exception No. 42.

36. For that the Court instructed the jury as follows: "When he comes into court and says that the defendant is liable to him for injuries which he has received by reason of his position with the defendant because of the negligence of the defendant, and claims that his rights to recover are provided by a statute of the United States, then the plaintiff elected to rely upon his right to recover as governed by the law as enacted by Congress; still, however, it does not change the burden of proof on the plaintiff to show that the defendant is responsible through its negligence for the injuries which he alleges he has received. This is defendant's exception No. 43. (Record, page 58.)

37. For that the Court instructed the jury as follows: "It is the duty of the defendant to provide a reasonably safe place for the plaintiff to work, and to furnish him with reasonably safe appliances with which to do his work." This is defendant's exception No. 44. (Record, page 58.)

38. For that the Court instructed the jury as follows: "It is the duty of the defendant to furnish the plaintiff with such reasonably safe appliances as are approved and in general use for that class of work, and if defendant furnished him with a glass water gauge, without safety appliances, and the safety appliance was in general use for that kind of gauge, and was wanting at the time defendant gave him his engine, and was not supplied while he was operating the engine, then he did not have a reasonably safe place to work, and if you so find from the evidence by its greater weight that he was injured while operating his engine with the safety shield or guard absent, and that that was the proximate cause of his injury, it would be your duty to answer the first issue 'Yes.'" This is defendant's exception No. 45. (Record, page 59.)

39. For that the Court instructed the jury as follows: "If you find from the evidence that it was turned over to him without the guard, and if you further find from the evidence that the guard was a proper safety provision for the use of that gauge, and that it was unsafe without it, then the defendant

did not furnish him a safe place, and a safe appliance to do his work, and if it remained in that condition it was continuing negligence on the part of the defendant, and if he was injured in consequence thereof, if you should so find by the greater weight of the evidence you should answer the first issue 'Yes.'" This is defendant's exception No. 47. (Record, page 60.)

40. For that the Court instructed the jury as follows: "If you should find from the evidence that he gave notice when he came back to the foreman of the roundhouse, the place where it was his duty to make known the absence of the guard glass, and was then told that there was none at hand, and to go on and use it, and he went on with the engine in that condition and used it and in consequence of using the engine with the glass water gauge in that condition he received his injury, then at the time he received the injury he was not in a safe place to work, and if he was injured in consequence thereof, and if you should so find from the evidence by the greater weight, you should answer the first issue 'Yes.'" This is defendant's exception No. 48. (Record, page 61.)

41. For that the Court, referring to the act of Congress instructed the jury as follows: "If it is in conflict with the State law, the State law is superseded, but where there is no conflict expressed by the statute of the United States, then the rule of the State prevails." This is defendant's exception No. 49. (Record, page 61.)

42. For that the Court instructed the jury as follows: "There has been no statute provided as applies to this glass water gauge which has been called to the attenion of the Court, so that leaves it open to the rights which the plaintiff might have under the law of this State, and the question of assumed risk, as has been argued by one, if not more of counsel, grows out of the contractual relations between plaintiff and defendant." This is defendant's exception No. 50. (Record, page 62.)

43. For that the Court instructed the jury as follows: "A man assumes the risk, when he takes employment, incident to the class of work that he has to perform." This is defendant's exception No. 51. (Record, page 62.)

44. For that the Court instructed the jury as follows: "The

position of locomotive engineer might well be regarded as more hazardous than other employment, therefore he assumes the risk of that character of employment, but he has the right when he enters into employment of that class of work to assume that his employer has done what the law requires it to do in providing him a reasonably safe place to work, with reasonably safe appliances with which to do his work, consistent with the character of the work which is to be performed." This is defendant's exception No. 52. (Record, page 62.)

45. For that the Court instructed the jury as follows: "He does not assume the risk incident to the negligence of his employer in providing machinery and appliances with which he has to work." This is defendant's exception No. 53. (Record, page 62.)

46. For that the Court instructed the jury as follows: "On the other hand the employer has the right to assume that his employee will go about the work in a reasonably safe way, and give due regard to the machinery and appliances which are in his hands and under his control, and if you should find from the evidence by its greater weight, because the burden in this instance is on the defendant, that the plaintiff knew of the absence of the guard or shield to the water gauge and failed to give notice to the defendant or to the agent whose duty it was to furnish the water gauge and appliance, and he continued to use it without giving that notice, it being furnished to him in a safe condition, then he assumed the risk incident to his work in the engine with the glass water gauge in that condition, although he might have handled his engine in every other respect with perfect care." This is defendant's exception No. 54. (Record, page 62.)

47. For that the Court instructed the jury as follows: "But if you find that he gave notice to the foreman of the roundhouse, and if you should find that the use of the water gauge was not so obviously dangerous that a reasonably prudent man careful of himself not to get hurt while he was about his work and went on and used it he would not assume the risk, but if the danger was so apparent that a reasonably prudent man, careful

of himself not to receive injury would see that he was in imminent danger and would observe by the use of it that he was endangering himself by going on and working with it, that there was greater danger of getting hurt than otherwise, and he continued to work with it, he would be assuming the risk and responsibility, and it would be your duty to answer that issue 'Yes.'" This is defendant's exception No. 55. (Record, page 63.)

48. For that the Court instructed the jury as follows: "Defendant says that if you should find the glass was unsafe, that there was a safe way provided by the other water guage, and the defendant insists that a reasonably prudent man would have seen the absence of this shield, and that it was his duty for his own safety to shut off the glass gauge and use the other one, and that in failing to do so he took the risk and assumed the responsibility and risk in continuing the use of the glass gauge without the shield." This is defendant's exception No. 56. (Record, page 63.)

49. For that the Court instructed the jury as follows: "And the same rule applies if the use of the glass without the shield was not so obviously dangerous as to cause a reasonably prudent man to stop the use of it, his going on and using it would not be assuming the risk in the use of it." This is defendant's exception No. 57. (Record, page 64.)

50. For that the Court instructed the jury as follows: "If it was so obviously dangerous that a reasonably prudent man would not use it, and he continued to use it instead of using the other, he would assume the risk." This is defendant's exception No. 58. (Record, page 64.)

51. For that the Court instructed the jury as follow on the issue of the contributory negligence: "That is governed largely by the same rules as applied to the question of assumption of risk. Did he continue to use the glass gauge when it was so obviously dangerous that a reasonably prudent man careful of himself would not do it? Was the danger so apparent that a reasonably prudent man would cease to use that and use the other gauge? If so, it would be your duty to answer the third

issue 'Yes.'" This is defendant's exception No. 59. (Record, page 64.)

52. For that the Court instructed the jury as follows: "But if the danger was not so obvious that a reasonably prudent man careful of himself would not realize the danger of using the water glass and he continued to use it, he would not be guilty of contributory negligence." This is defndant's exception No. 60. (Record, page 64.)

53. For that the Court instructed the jury as follows: "If you answer the first issue 'Yes' and the second issue 'No,' and the third issue 'No' or 'Yes' either, because under this law if the defendant was guilty of negligence, the plaintiff would be entitled to recover notwithstanding the plaintiff was guilty of contributory negligence." This is defendant's exception No. 61. (Record, page 64.)

54. For that the Court instructed the jury as follows: "But if you should answer the third issue 'Yes' that the plaintiff was guilty of contributory negligence, then the defendant would be entitled to have a set off against any damage which he otherwise might recover. But if you answer it 'No,' then give him the full measure of his injuries." This is defendant's exception No. 62. (Record, page 64.)

55. For that the Court instructel the jury as follows: "If you come to the question of damages, it is your duty in assessing damages to give the plaintiff a just compensation for the injury which he has received to compensate him for the physical and mental pain and suffering occasioned by the injury, if any, the loss of time, if any, resulting from the injury, his lessened capacity, if any, to earn a livelihood, the probable extent and duration of his injury, its consequence upon his earning capacity and suffering, whether his suffering is to continue or not; and in one sum you will estimate his damages in dollars and cents, from which you will deduct, if you find he is guilty of contributory negligence, such amount as in your judgment should be deducted on that account from his actual damages." This is defendant's exception No. 63. (Record, page 65.)

56. For that the Court instructed the jury as follows: "It is

the duty of the defendant under this act to furnish the plaintiff safe, sound and suitable machinery, such as was reasonably safe, if the jury should find from the evidence that the defendant negligently furnished plaintiff an unsafe and unsound water glass, as described in the complaint, and the plaintiff was injured on account of such negligent failure to furnish such safe and sound water glass, you will answer the first issue 'Yes,' provided you find that he was injured and that the failure to furnish this safe water glass was the proximate cause of the injury." This is defendant's exception No. 64. (Record, page 65.)

57. For that the Court instructed the jury as follows: "It is a duty that the master owes his servants to furnish reasonably safe implements and machinery for the use of his servants while in his employ, and he cannot absolve himself from this duty. If the jury should find from the evidence that the defendant failed to furnish the water glass to the plaintiff as it was his duty to do in the operation of his engine and in consequence of which, if the jury should find from the evidence that the plaintiff was injured by the negligent construction and provision of the water glass, as alleged in the complaint, you should answer the first issue 'Yes,' but if the jury should find from the evidence that the water glass furnished by the defendant was safe and sound and such as was in general use, and that the injury of the plaintiff was caused by his own negligent use thereof, you should answer the first issue 'No,' but if you should find from the evidence that the cause of the injury was in the construction and provision of the water glass, and also in the negligent use of the same by the plaintiff, then you should answer the first issue 'Yes,' and shall diminish the amount of damages so found by them in proportion to the amount of negligence, which, under the evidence, is attributable to the plaintiff." This is defendant's exception No. 65. (Record, page 65.)

58. For that the Court instructed the jury as follows: "If you find by the preponderance of the evidence that the water glass by which plaintiff was injured was not provided with a guard glass and the condition of the water glass was open and obvious, and was fully known to the plaintiff, and he continued to use

such water glass with such knowledge and without objecting, and knew the risk incident thereto, then the Court charges you that the plaintiff was guilty of contributory negligence, and you will answer the third issue 'Yes.'" This is defendant's exception No. 66. (Record, page 66.)

59. For that the Court refused defendant's motion for judgment *non obstante veredicto*. This is defendant's objection No. 67. (Record, page 66.)

60. For that the Court refused defendant's motion for judgment on the verdict. This is defendant's exception No. 68. (Record, page 66.)

61. For that the Court refused defendant's motion to set the verdict aside as against the weight of the evidence. This is defendant'sexception No. 69. (Record, page 67.)

62. For that the Court refused defendant's motion to set the verdict aside because the amount awarded is excessive. This is defendant's exception No. 70. (Record, page 67.)

63. For that the Court refused defendant's motion for a new trial for errors occurring during the trial in the admission and exclusion of evidence and in the Court's charge to the jury and in the Court's refusal to give defendant's requests for instruction. This is defendant's exception No. 71. (Record, page 67.)

64. For that the Court signed judgment as appears in the record. This is defendant's exception No. 72. (Record, page 67.)

Such of these errors as bear directly upon the denial of a right, privilege or immunity under the Federal Act are fully discussed in the brief on file.

In a consideration on merits there are certain exceptions to evidence which were passed on by the Supreme Court of North Carolina but which are not discussed in the brief already on file, which brief was directed mainly to a discussion of rulings which denied to plaintiff-in-error rights under the Employers Liability Act.

These exceptions we will consider here, and in discussing them the word "plaintiff" refers to defendant in error, and the word "defendant" refers to plaintiff in error.

Exceptions to Evidence

Exceptions Nos. 1 and 10.—Plaintiff testified that when he started on the first trip with this engine he noticed that the guard glass was gone. He then testified that he ran it that trip and came back again. "I ran the engine to the coal chute track or track opposite the turntable, and told Mr. Matthews, the day round-house foreman at Johnson Street—he is here now—there he sits—I told him this guard glass was gone, and asked him if he had one. He said they did not keep them in stock here, that they were made in Portsmouth, and he would have to send to Portsmouth to get one—to run her like she was. He said he would send to Portsmouth and get me one."

The defendant objected in apt time to the conversation with Matthews and to any statement made by Matthews to the plaintiff, and asked that the evidence be stricken out. Objection overruled, and defendant excepted.

There is an entire absence of allegation in plaintiff's pleadings that he reported the defect in this water guage and was given a promise to repair.

"A servant must either aver his want of knowledge of the defect which caused the injury, or that, having such knowledge, he informed the master and continued in the employment upon a promise, express or implied, to remedy the defect."

Railroad v. Norman, 49 Ohio St., 598.
Griffiths v. Docks Company, 13 Q. B. Div., 259.

There must be allegations as well as proof.

McCoy v. R. R., 142 N. C., 383.

In this case Mr. Justice Brown says: "It is settled maxim of the law that proof without allegation is as unavailing as allegation without proof," citing *Moss v. Railroad*, 122 N. C., 971; *Conley v. Railroad*, 109 N. C., 692; Elliott on Railroads, section 1594.

The statement by the plaintiff that Matthews told him "to run her like she was" was entirely an afterthought on the

plaintiff's part. The importance of a promise to repair was impressed upon him by the argument at the former trial. In examining him with respect to his evidence at that time, and in order to show that he had injected this new element into his evidence, the defendant asked plaintiff if he could find anything in his former testimony about Matthews telling him to go ahead with the engine. This question was excluded, and defendant excepted. (Exception No. 10, record, page 68.)

It is not shown that Matthews was authorized to receive verbal complaints and remedy defects. On the other hand, it specifically appears that the plaintiff was required to report all defects in writing. The form of the report will be found in the record (page 49 *et seq.*) The plaintiff filled out three of these reports while he was running this engine, and made no reference to the absence of the guard glass. At the bottom of each report this note appeared: "Enginemen must carefully inspect their engines after each trip and report their condition on this form, whether needing repairs or not. They will be held responsible for defects not reported. *No attention will be given to verbal reports or reports not signed by enginemen.*"

Not only did this note appear on the work report, but the defendant's rules by which the plaintiff was controlled provided that: "Enginemen in making reports of the condition of engines at the end of trip, must state specifically in writing each and every defect which requires attention." (Rule 668; Record, page 23.

Exceptions Nos. 5 and 13. The Court admitted the following evidence over defendant's objection:

Q. Have you applied for any job to run a locomotive engine? A. No, sir; it's no use. (Record, page 14.)

Defendant objects to the language, "it's no use," and asks the Court to strike it out. Objection overruled. Defendant excepts.

Q. What effort have you made to get employment with any other road? A. None; it's no use; just a waste of time and money to go and see about it. (Record, page 17-18.)

Defendant objects to the language "it's no use, just a waste of

time and money to go and see about it." Objection overruled. Defendant excepts.

The plaintiff was permitted to throw his opinion into the case upon a material point. He contended that the principal element of damage was his inability to follow his chosen occupation. Yet it appears from his own statement that he made no effort whatever to secure such employment. Plaintiff realized the force of that statement and attempted to meet it by the expression of his opinion, unsupported by any evidence that it was no use to make application for such position; that it would be a waste of time and money. Plaintiff's persistence in making this answer indicates his faith in its effectiveness as an answer to the damaging admission that he had made no effort to secure a position as engineer. We submit that he was justified in his faith, and that this evidence was clearly harmful to the defendant, and, if it is erroneous, the defendant is entitled to a new trial for its admission. We do not think that the error in admitting this evidence is open to dispute.

Horton testified that an engineer that can stand an examination on one road can stand them on any road in the United States; they have practically the same rules and the same examinations. (Record, page 18.)

The rules and the character of examination required by the Seaboard Air Line Railway are set forth in the examination made by Dr. K. P. Battle (Record, page 34.). Plaintiff, *with his sight in the same condition as at the time of the trial*, passed that examination. In spite of that fact, he is permitted to express the opinion that it is no use for him to make application to other roads on which the same rules are in force and the same examination is made.

Exceptions Nos. 6 and 7.

Q. State if you have had mental suffering on account of your injury?

Exception No. 6. (Record, page 14.)

A. Yes, I worry day and night because I cannot follow my chosen occupation. I can't make half the money I did make.

Defendant objects to the answer to this question and asks that it be stricken out. Overruled and defendant excepts. Exception No. 7. (Record, page 14.)

We do not know of any case which holds that worry because of plaintiff's inability to follow his chosen occupation is an element of damage in an action of this character. We submit that this is particularly true when the sole evidence of plaintiff's inability to follow his chosen occupation is the creation of his own imagination, as expressed in his opinion that it is "no use" to apply for a position as engineer.

Exceptions Nos. 11 and 12.—In order to show that the plaintiff's eye had been injured by a piece of glass in 1903, prior to the time of his examination by Dr. Battle, the defendant offered in evidence a paper executed by Horton on July 29, 1903 (Exhibit G, Record, page 53), which released the defendant "from all claims and causes of action for or by reason of the injuries received by me caused by water glass bursting and particles of same flying in his eye on or about June 10, 1903." The record discloses that when Dr. Battle examined Horton in 1905 he found a scar on the cornea of his left eye. It was the defendant's contention that the scar was produced by the explosion of the water glass on June 10, 1903, as recited in the release, and that the same scar existed at the time of the trial and caused the injury complained of. In order to meet this contention, plaintiff was permitted to testify, over defendant's objection and exception (Record, page 17-18) as follows:

"I started to say Mr. Baldwin came up to me in front of ing-Crowell drug store.

He was detective for the Seaboard, and said he was going to pay me for my time. I said I didn't want pay. He said he had been to see the doctor and he said there was nothing the matter with my eye, that it was just irritated; I lost 4 days, it amounted to eight or ten dollars, probably fifteen, and I signed it and in about 30 days they gave me a voucher for 8 or $10, certainly not over $15."

We submit that the plaintiff's statement that Baldwin said

he had been to see the doctor, and he said there was nothing the matter with my eye; that it was just irritated, is clearly incompetent and prejudicial to the defendant.

Exception No. 17.—The Court sustained the plaintiff's objection to the following question asked the defendant's witness P. M. Matthews, roundhouse foreman for he defendant: "Q. If this defect had been reported on the work report by engineman Horton, the absence of the guard glass, what would you have done?"

The plaintiff contended that it was useless to report the defect in writing, as he was required to do, because the defendant did not have a supply of guard glasses on hand at Raleigh and, therefore, could not remedy the defect. To meet this contention the defendant proposed to show what would have been done by P. M. Matthews, the foreman of the round-house, if the absence of the guard glass had been properly reported. We think that the evidence was competent and its exclusion prejudicial to the defendant.

Exceptions 24 and 25.—The Court permitted the plaintiff's witness E. C. Horton, to testify in regard to the condition of the water glass on engine 752 which was used by the plaintiff, as follows, over defendant's objection: "How was it on the trip just after the injury?" "A. It had a little thin glass in that shield there, it was very greasy from machinists handling it so that I couldn't see the water tube to locate the water level in boiler, and I taken it out and cleaned it. It was so thin it shook this way (indicating.) When I got to Cary I cut wedges and stuck in here to steady the glass to keep it from jarring back and forth in the grooves of the shield. When I discovered that the glass was out of here when I made this trip, I went to the foreman and told him that there was no shield glass." (Record, page 41.)

The defendant moved to strike out this answer, but the Court refused to do so. The condition of the guage on the trip after the accident was not material, and we submit that it was incompetent to admit this testimony. The statement that when

E. C. Horton discovered that the guard glass was out when he made this trip, he went to the foreman and told him that there was no shield glass was particularly harmful in its effects, because it was intended to support the plaintiff's contention that it was proper to make verbal reports of such defects.

Exceptions Nos. 23 and 26.—The Court permitted the plaintiff's witness J. A. Massey, over the defendant's objection, to testify as follows: "Q. I wish you would state to the jury if you know what the custom and practice was in respect to engineers obtaining supplies for their locomotives?" "A. It was customary for engineers when they wanted to get supplies out of the store-room, to go to the general foreman and get a requisition for whatever they wanted." (Record, page 40.)

A similar question was asked E. C. Horton, and he was permitted to answer it:

"Q. What was the custom and practice down there when a shield to the guard glass or tube or any part of the engine was missing in the cab?" "A. The inner tube—there would be a machinist's report—but as to that shield glass there, I could get a requisition and go to the store room and get it and drop it down. Anybody could drop one in, just as you are doing that now. I would apply to the foreman for requisition, verbally. The foreman's clerk makes out the requisitions and we carry them to him to get him to O. K. them. The guard glass, bolts, nuts, anything for repairing machinery, is kept in the store room—flags, torpedoes. We go to the foreman and get a requisition and draw them." (Record, page 41.)

We submit that it was not competent to prove the custom and practice of engineers with respect to securing supplies for their engines. The rules provided specifically that defects must be reported in writing, and that verbal reports would be disregarded.

Exceptions Nos. 27 and 28.—All of the following evidence was admitted over defendant's objection and exception:

"Q. State if it was the custom and practice of engineers down there to run their engines without the guard glass at all?

"A. As to that special kind, I only run this engine with that, but the old shields that we did run without any guard glass on." (Record, page 42.)

In the first place, we say that it is incompetent to show the custom of engineers to use a water glass without the safety appliance. But if it is admitted that such evidence is competent, the answer of the witness that he had run the *old shields* without any guard glass is clearly incompetent. The witnesses testified that the Buckner guage, when used without the guard glass, is more dangerous than the old guage, because the force of the steam is concentrated.

Exceptions Nos. 29 and 30.—E. C. Horton, witness for plaintiff, was asked: (Record, page 42.)

"State what was the duty of engineer if he found the guard glass gone, whether or not it was his duty to shut off the guard glass and run with the guage cocks." He answered: *"I never did."* Defendant objected to the question and answer, and moved to have the answer stricken from the record. This witness by his answer threw the weight of his conduct into the case to influence the jury in determining that the plaintiff did not assume the risk when he failed to cut off the water guage and use the guage cocks. We submit that his answer to the question is incompetent.

Exception No. 33.—The Court permitted the plaintiff's witness, Dr. A. W. Goodwin, to testify as follows over defendant's objection:

"Q. If the jury should find from the evidence that Horton has got 20-70 sight in one eye and normal in the other, would he, in your opinion, be suited for a railroad engineer's duties?"

"A. I shouldn't say so. That is my general opinion."

Dr. Goodwin did not qualify as an expert in the special line of the treatment of the eye. He states specifically that the examination of the eye is not in his line of practice, and that if a patient should come to him with defective sight he would send him to a specialist. (Record, page 46.)

It is manifest that Dr. Goodwin is not an expert in the oper-

ation of a locomotive engine. He has no peculiar knowledge of the duties of an engineer that would qualify him to express an opinion as to the amount of vision required to suit a man for a railroad engineer's duties. Yet he is permitted to express an opinion contrary to the opinion of an admitted eye expert, whose duties required him to pass upon the vision of applicants for the position of railroad engineer. Dr. K. P. Battle testified that "a man has good sight who has normal in one eye and 20-70 in the other," and his opinion that the plaintiff, whose sight was found to be in that condition, was fit to perform the duties of an engineer, so far as his sight was concerned, is shown by the fact that he approved his examination when plaintiff applied for promotion as an engineer. This examination was further approved by the superintendent of the second division of the defendant's road, and the plaintiff permitted to begin the performance of his duties as engineer. (Record, page 34.)

The harm in permitting Dr. Goodwin to express this opinion becomes apparent when it is considered that the chief element of damage relied upon by the plaintiff was his inability to secure a position as engineer because of the defect in his sight. He was asked if he had applied for any job to run a locomotive engine, and answered, "No, sir; it's no use." (Record, page 14.) "Q. State if you have had mental suffering on account of your injury. A. Yes; I worry day and night because I cannot follow my chosen occupation. I cannot make half the money I did." (Record, page 14.) On cross-examination, plaintiff was asked: "What effort have you made to get employment with any other road?" He answered: "None; it is no use; just a waste of time and money to go and see about it."

The expression of opinion by Dr. Goodwin was offered for the purpose of showing that the plaintiff cannot follow his vocation as an engineer, and relating as it does to the most serious element of damage in the case, we submit that it was manifestly harmful to the defendant, and entitles the defendant to a new trial. See, also, exception No. 34. (Record, page 47.)

We submit that for the errors committed in giving and refusing instructions to the jury and other errors, discussed in our

former brief, as well as for the errors in the admission of testimony discussed herein, the plaintiff-in-error is entitled to a reversal of the judgment in this case.

Respectfully submitted,

HILARY A. HERBERT,
BENJAMIN MICOU,
RICHARD P. WHITELY,
MURRAY ALLEN,
Attorneys for Plaintiff-in-Error.

FILED
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JAMES D. MAHER
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1913

SEABOARD AIR LINE RAILWAY
Plaintiff in Error

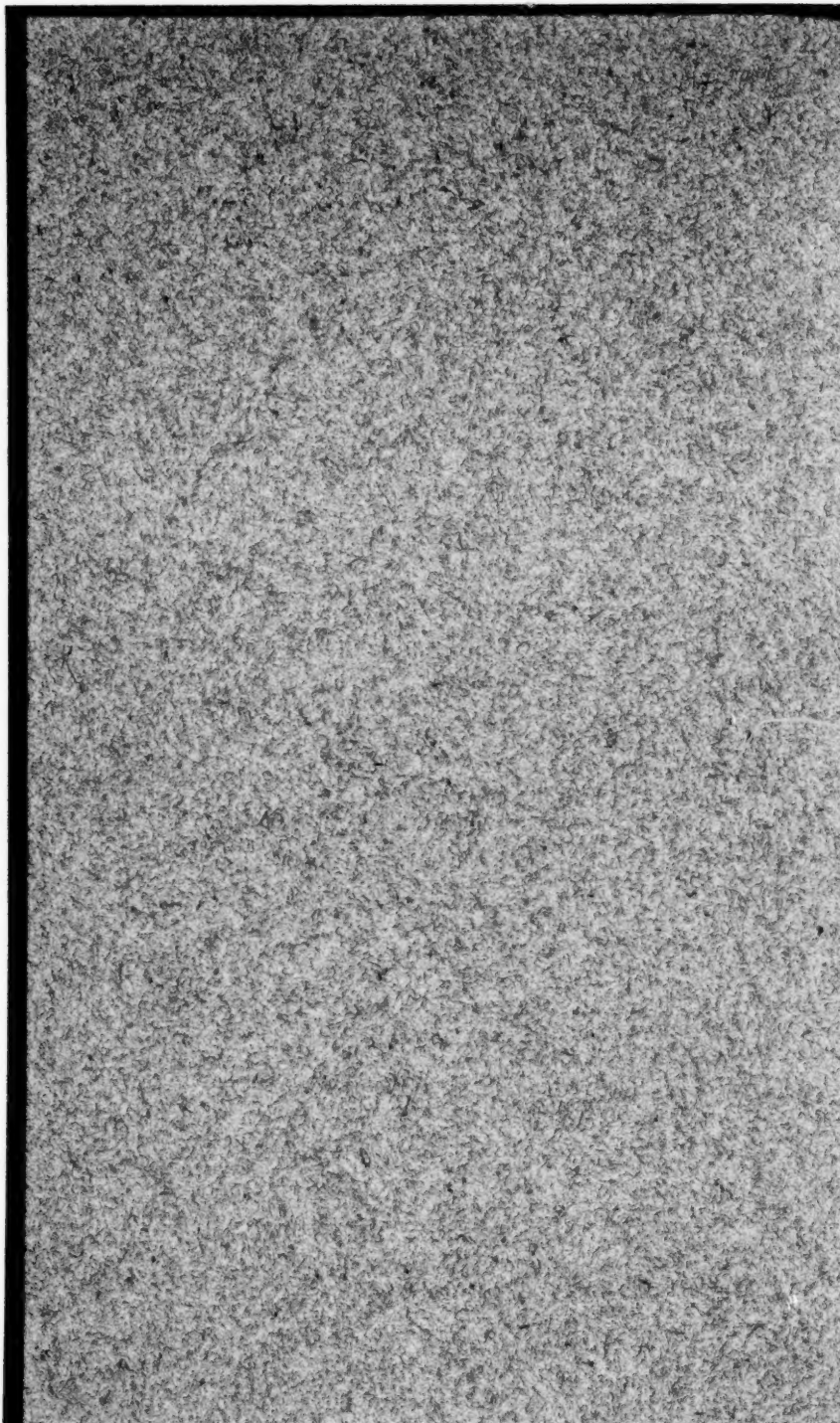
v.

JAMES T. HORTON
Defendant in Error

No. 691

Defendant in Error's motion to dismiss the writ of error or affirm the opinion and judgment rendered by the Supreme Court of North Carolina, and motion to transfer to summary docket. Notice to Plaintiff in Error, and brief in support of motion of James T. Horton, to dismiss the writ of error, or affirm the opinion and judgment rendered by the Supreme Court of North Carolina.

WILLIAM C. DOUGLASS
Counsel for Defendant in Error



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1913

SEABOARD AIR LINE RAILWAY,
Plaintiff in Error.
v.
JAMES T. HORTON,
Defendant in Error.

No. 691

ON WRIT OF ERROR TO THE SUPREME COURT OF NORTH CAROLINA.

MOTION ON BEHALF OF JAMES T. HORTON, DEFENDANT IN ERROR, TO DISMISS THE WRIT OF ERROR OR AFFIRM THE OPINION AND JUDGMENT RENDERED BY THE SUPREME COURT OF NORTH CAROLINA; AND, IF THE COURT SHOULD DESIRE TO HEAR ARGUMENT, TO TRANSFER SAID CAUSE TO THE SUMMARY DOCKET.

Comes now the Defendant in Error, James T. Horton, by his counsel, William C. Douglass, appearing in his behalf, and moves the court to dismiss the writ of error in the above-entitled cause for want of jurisdiction upon the grounds hereinafter set forth in the brief filed herewith.

The Defendant in Error further moves the court to affirm the opinion and judgment rendered by the Supreme Court of North Carolina, upon the ground that it is manifest that the writ of error was taken for delay only and that the ques-

tions on which the decision of the cause depend are so frivolous as not to need further argument. If the court should desire to hear argument, then the Defendant in Error further moves the court to order this cause transferred to the summary docket provided for by this court in an amendment to Rule 6, as the case is of such a character as not to justify extended argument.

The grounds of these motions, the statement of the case, facts and argument are more fully set forth in the briefs accompanying the motions, all of which is herewith submitted.

WILLIAM C. DOUGLASS,
Counsel for Defendant in Error.

Notice to Seaboard Air Line Railway.

To Seaboard Air Line Railway, Plaintiff in Error, and Benjamin Micou, Esq., its counsel:

Please take notice that on Monday, the .... day of December, 1913, at the opening of the court, or as soon thereafter as counsel can be heard, the motions of which the foregoing are copies, will be submitted to the Supreme Court of the United States for the decision of the court thereon.

Attached hereto are copies of the motions to dismiss and affirm, the briefs and arguments to be submitted in support thereof; and also the motion to transfer this cause to the summary docket, if the court should desire to hear argument thereon.

WILLIAM C. DOUGLASS,
Counsel for Defendant in Error.

Service of copies of the above-mentioned motions, notices, and copies of briefs, acknowledged and accepted this .... day of ....., 1913.

....,
Plaintiff in Error, by

....,
Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES,

October Term, 1913.

SEABOARD AIR LINE RAILWAY,
Plaintiff in Error.
v.
JAMES T. HORTON,
Defendant in Error.

No. 691.

DEFENDANT IN ERROR'S BRIEFS ON MOTIONS TO DISMISS THE WRIT OF ERROR FOR WANT OF JURISDICTION, AND TO AFFIRM THE JUDGMENT OF THE STATE COURT.

STATEMENT OF CASE.

Briefly stated, the record in this case shows that James T. Horton, Defendant in Error, was, at the time of the injury complained of, in the employ of the Plaintiff in Error, and was engaged as a locomotive engineer in operating a train engaged in interstate commerce.

On the 27th day of July, 1910, the Defendant in Error left Raleigh, North Carolina, on his regular run with one of Plaintiff in Error's locomotives, which was equipped with a Buckner Water Gauge. (This water gauge sets at a point on the boiler head to the left of the engineer. On the inside of the brass case of the water gauge is a small, thin glass tube. The entire pressure of steam in the boiler passes into this glass tube. The guard glass is placed in the opening in the brass case to protect the engineer from flying glass, if the glass tube should burst.) After Defendant in Error had started

on his trip on said day, he discovered that the guard glass was missing. He made the round trip with the locomotive and on his return to Raleigh, his original starting point, he approached Mr. Matthews, the round house foreman, and told him the guard glass was gone, and asked him if he had one. He (the foreman) said they did not keep them in stock here (at Raleigh); that they were made in Portsmouth and he would have to send to Portsmouth to get one—to "run her like she was."

The Defendant in Error in pursuance of the foreman's orders, ran the engine without the guard glass, and on his return trip, the second day thereafter, the glass tube in the water gauge blew out and the Defendant in Error's eye was injured as alleged in the complaint. If the guard glass had been in place the Defendant in Error would not have been injured.

BRIEF ON MOTION TO DISMISS FOR WANT OF JURISDICTION.

The plaintiff in Error has presented no federal question in its writ of error, and we contend that it has been denied no right, privilege or immunity under the Act of Congress (Employers' Liability Act), and that this court has no jurisdiction.

The Plaintiff in Error brings this case here, contending that it was denied a right, privilege or immunity under the Employers' Liability Act in the application of the doctrine of *assumption of risk*. Upon a thorough examination of the record, the court will find that the question at bar raised by the various assignments of error may, with propriety, be grouped into almost a single legal question, although presented in different forms, to wit: WHERE A SERVANT WORKS ON IN THE FACE OF A KNOWN DEFECT, HE CANNOT RECOVER. But under the evidence in the case, a new factor was introduced, to wit: "WHERE THE MASTER PROMISES OR

GIVES THE SERVANT REASONABLE GROUNDS TO INFER OR BELIEVE THAT THE DEFECTS WILL BE REPAIRED, THE SERVANT DOES NOT ASSUME THE RISK OF INJURY CAUSED THEREBY WITHIN SUCH PERIOD OF TIME AFTER THE PROMISE AS WOULD BE REASONABLY ALLOWED FOR ITS PERFORMANCE, UNLESS THE DANGER IS SO PALPABLE, IMMEDIATE AND CONSEQUENT THAT NO ONE BUT A RECKLESS PERSON WOULD EXPOSE HIMSELF TO IT."

We have thus briefly set forth the facts and the contentions of the Plaintiff in Error that we might get the case concisely before the court, and will base our argument upon the motions to dismiss and to affirm on these statements.

The Plaintiff in Error did not specifically claim, nor was it denied any right, privilege or immunity under the Employers' Liability Act.

The Defendant in Error contends that no right, privilege or immunity was specially claimed or set up in this action, and that no such right, privilege or immunity was denied the plaintiff in error in the judgment of the Supreme Court of North Carolina, and hence, there is no federal question to decide, and this court has no jurisdiction.

The case comes here on the contention of the Plaintiff in Error that the trial court erred in its instructions relative to the issue of *assumption of risk*, and erroneously refused certain prayers for instruction in relation thereto.

It is true that this action was brought and tried under the Federal Statute, but the State courts, under the Act, have concurrent jurisdiction and this court has no right to review the judgment of the State court unless the Plaintiff in Error has been denied some right, privilege or immunity under the Act of Congress (Employers' Liability Act).

Murdock v. Mayor, etc., of Memphis, 20 Wall., 590; 22 L. Ed., 429.

Assumption of risk is a common-law defense and not a creation of the federal power.

The Act of Congress in question grants no right, privilege or immunity that did not exist at common law. The Defendant in Error, before the enactment of the Employers' Liability Act, could have maintained an action at common law in the State courts to recover damages for injuries caused by negligence. At common law, the Plaintiff in Error could have set up the defense of assumption of risk.

The defense of assumption of risk was not created and was not enlarged by this Act of Congress; it is a *common law defense.* If it could be termed in any sense a right, privilege or immunity, then it is not *a creation of the federal power,* and besides, we look the record in vain to find where this defense was denied the Plaintiff in Error.

The Supreme Court of North Carolina, in the case of *Burnett v. Atlantic Coast Line Railroad Co.,* 79 S. E. Rep., page 414, in an action brought under the Employers' Liability Act, says:

> "The Act of Congress creates no right in this class of employees that did not exist at common law, as they had the right, before the Act of Congress, to maintain an action in the State court to recover damages for injuries caused by negligence. . . . The change in the law as to contributory negligence confers no right, and is operative only to withdraw from the company a defense theretofore existing, and the same may be said as to changes in the doctrine as to the negligence of a fellow-servant, and of assumption of risk. This seems to be the construction of the Act adopted by the circuit court of appeals in *Garrett v. Railroad,* 197 Fed., 715; 117 C. C. A., 109; in which the court says: 'The damages allowed to the injured employee are but declaratory of rights existing at common law.' . . . The Act supersedes the State law and thereby deprives the employee of a right of action existing at common law. It is en-

> titled, 'The Employers' Liability Act,' and was enacted for the benefit and protection of employees. It was designed to make it easier for employees to recover damages for injuries caused by negligence and not to impose conditions destructive, not of the remedy, but of the right."

The Supreme Court of the United States in the case of *Pennsylvania Railroad Co. v. Hughes,* 191 U. S., 478, holds that the highest court of the State may administer the common law according to its own understanding and interpretation, without liability to a review in the Federal Supreme Court, unless some right, title, immunity, or privilege THE CREATION OF THE FEDERAL POWER has been asserted and denied. Mr. Justice Day, in rendering this opinion, at page 486, uses the following language:

> "In *Grogan v. Adams Express Co.,* 114 Pa., 523, the Supreme Court of Pennsylvania expressly declined to follow the rule laid down in *Hart v. Pennsylvania Railroad Co.,* adhering to its own declared doctrine, denying the right of a common carrier to thus limit its liability for injuries resulting from negligence. The cases are numerous and conflicting, different rules prevailing in different States. The federal courts in cases in which they have jurisdiction will doubtless continue to follow the rule in the Hart case, but the highest court of Pennsylvania may administer the common law according to its understanding and interpretation of it, being only amenable to review in the federal Supreme Court where some right, title, immunity, or privilege, the creation of the federal power, has been asserted and denied."

In this case the Plaintiff in Error seeks to have the Supreme Court of North Carolina reviewed upon its construction and application of the common law doctrine of assumption of risk, and we contend that this court has no jurisdiction to review the State court upon the same.

The Plaintiff in Error elected to have the question of Defendant in Error's continuing to work in the face of a known danger, tried under both the issue of contributory negligence and assumption of risk.

In the original answer of the Plaintiff in Error, in its further defense, page five of the printed record, we find the following:

> "Allegation 3. That if the defendant was negligent as alleged in the complaint, which is again expressly denied, the plaintiff by his own negligence contributed to his injury, if any he has sustained, in that, having knowledge of the character and condition of the water-glass on the engine upon which he was employed, and knowing the risk incident to its use in that condition, he negligently and carelessly continued to use said water-glass and the defendant pleads plaintiff's contributory negligence in bar of his right to recover in this action."
>
> "Allegation 4. The defendant again denying that the plaintiff sustained the injuries alleged in the complaint, says that if the water-glass on the engine on which he was employed was not modern in its make, and was defective in any respects, both of which are denied, the character and condition of said water glass were open and obvious and were fully known to the plaintiff and he continued to use said water glass with such knowledge and without objection, and he knew and voluntarily assumed the risk incident thereto, and the defendant pleads such voluntary assumption of the risk in bar of plaintiff's right to recover in this action."

Both of these allegations are repeated in the amended answer of the Plaintiff in Error in its further defense, on page seven of the printed record, and numbered respectively 5 and 6.

The Plaintiff in Error in special prayers for instructions, requested the trial judge to charge the jury as follows:

(Eighth special prayer for instructions, page 56 of the printed record):

> "If you answer the first issue 'Yes', and the second issue 'No,' and if you find by the greater weight of the evidence that the plaintiff knew of the condition of the water-glass on the defendant's engine, and knew the risk incident to its use in that condition, and continued to use such glass, and if you find that a man of ordinary prudence would not have used it, then the court charges you that the plaintiff is guilty of contributory negligence, and you will answer the third issue 'Yes.'"

The trial judge in response to the Plaintiff in Error's request on contributory negligence (on page 64 of the printed record under exception No. 58) instructed the jury as follows:

> "If you answer the first issue 'Yes,' and the second issue 'Yes,' that he assumed the risk, you need not answer the others, because he could not recover, but if you answer the first issue 'Yes' and the second issue 'No,' then it becomes your duty to answer the third issue: if so, did the plaintiff by his own negligence contribute to his injury as alleged in the answer? That is governed largely by the same rule as applied to the question of assumption of risk. Did he continue to use the glass gauge when it was obviously dangerous that a reasonably prudent man, careful of himself would not do it? Was the danger so apparent that a reasonably prudent man would cease to use that and use the other gauge? If so, it would be your duty to answer the third issue 'Yes.'

Again, his Honor charged the jury under the special requests of the Plaintiff in Error, in respect to assumption of risk (page 66 of the printed record, under exception No. 66):

> "If you answer the first issue 'Yes,' then the court charges you that if you find by the preponderance of the evidence that the absence of the guard glass and water gauge was open and obvious, and was fully known to the plaintiff, and he continued to use the said glass with such knowledge, and that the plaintiff reported the defect and was given a promise to repair, and you further find that the plaintiff knew, and appreciated the danger incident thereto, and that the danger was so obvious that a man of ordinary prudence would not have continued to use the gauge without the guard glass, then the court charges you that the plaintiff assumed the risk and you will answer the second issue 'Yes.'"

The court will note that this prayer in respect to assumption of risk was given in the exact language requested by the Plaintiff in Error, and that THE JURY FOUND THE ISSUE OF CONTRIBUTORY NEGLIGENCE IN FAVOR OF THE PLAINTIFF IN ERROR and we respectfully contend that the Plaintiff in Error cannot now be heard to say that this phase of the case should have been submitted to the jury on the question of assumption of risk alone; that the case was tried upon the theory advanced by the Plaintiff in Error and if the judge erred in submitting these two defenses to the jury, the error WAS INVITED BY THE PLAINTIFF IN ERROR.

If the Plaintiff in Error in its writ of error in this case presents a federal question, then, each and every question passed upon by a State court in trials under the Federal Employers' Liability Act is reviewable by this court. Every rule and principle governing the law of master and servant would stand for review by this court and there would be nothing for the appellate courts of the various States to do but to transfer cases under the Act to this court to be tried. Such was not the purpose of the Act, when jurisdiction was given to the State courts by Congress; and no right, privilege or immunity *granted under the Act* having been denied

the Plaintiff in Error, the writ should be dismissed for want of jurisdiction. Again, if this case was tried in the State court under the theory advanced by the Plaintiff in Error, and if the alleged errors now complained of by the Plaintiff in Error were *invited by it,* then the Plaintiff in Error ought not to be allowed to *take advantage of its own wrong* and the writ ought to be dismissed.

BRIEF ON MOTION TO AFFIRM.

The Defendant in Error contends that the record in this case shows clearly that the writ of error was taken for delay only, and that the questions on which the decision depends are so frivolous as not to need further argument, and that the case is of such a character, as not to justify extended argument.

This case has been twice carried to the Supreme Court of North Carolina on practically the same point; the first time, upon appeal by the plaintiff in the State court from a nonsuit granted by the trial judge. The Supreme Court in a unanimous opinion reversed the trial judge, and the cause was sent back for a trial by jury, and the verdict set forth in the record was rendered. There were no objections or exceptions to the issues submitted to the jury in the trial court. The jury found the issue of negligence in favor of Defendant in Error, the issue of assumption of risk in favor of Defendant in Error, the issue of contributory negligence in favor of Plaintiff in Error, and under the judge's instructions in respect to comparative negligence assessed the damages as set forth in the record.

We might with safety rest this case on the excellent opinion filed by Allen, Judge, pages 78-87 of the record, concurred in by Chief Justice Clark, on page 87 of the record, and the citations in said opinion, which we refer to and adopt, but relying upon other decisions in addition thereto, we proceed with the argument upon this motion to affirm.

The Servant Cannot Assume the Risk of the Negligence of the Master.

Chief Justice Fuller, in *Union Pac. Ry. Co. v. O'Brien*, 161 U. S., page 452, says:

> "The servant undertakes the risk of the employment as far as they spring from defects incident to the service, but he does not take the risk of the negligence of the master." Citing *Hough v. Texas*, 100 U. S., 213, and many other cases.

In *Hicks v. Mfg. Co.*, 138 N. C., 319, the court held:

> "While the employee assumes all the ordinary risks incident to his employment, he does not assume the risk of defective machinery and appliances due to the employers' negligence."

The opinion in the case of *Marks v. Cotton Mills*, 138 N. C., 402, was rendered by Hon. Henry G. Connor, at that time on the bench of the Supreme Court of North Carolina, and now judge of the District Court for the Eastern District of North Carolina. His Honor in rendering the opinion, among other things, says:

> "After long and anxious consideration, and much conflict of opinion, this court, coming into harmony with many of the ablest courts of the Union, including the Supreme Court of the United States, adopted in all cases involving the question of negligence, the standard of conduct followed by the ideal prudent man."

And following this, further says:

> "The question whether the plaintiff assumed the risk, or, as it may be stated, was guilty of contributory negligence, was peculiarly for the decision of the jury."

In *Pressly v. Yarn Mills*, 138 N. C., at page 417, the court says:

> "His (the master's) duty to furnish machinery and appliances reasonably safe and suitable, and as are approved and in general use, in the exercise of reasonable care, is absolute; . . . and accordingly, the principle which holds the employee to an equality of obligation and responsibility in the respect suggested is unsound and unjust and has been rejected in the more recent and better considered cases." Citing and approving *Beach on Contributory Neg.*, sec. 317; *Cain v. Railroad*, 128 U. S., 91; *Smith v. Baker*, App. Cas. (1891), 325; *Patterson v. Pittsburg*, 76 Pa. St., 389; *Lloyd v. Hanes*, 126 N. C., 359."

To the same effect are the cases of:

Gotlich v. Railroad, 100 N. Y., 467.
Mann v. Railroad, 111 N. C., 482.
Hudson v. Railroad, 104 N. C., 491.
Schlacker v. Ashland Iron Mining Co., 89 Mich., 262.
Green v. Minneapolis and St. L. Ry. Co., 31 Minn., 248.
Sims v. Lindsay, 122 N. C., 678.
Sibbert v. Cotton Mills, 145 N. C., 311.
Leggett v. Railroad, 152 N. C., 111.
Bissell v. Lumber Co., 152 N. C., 124.
Tanner v. Lumber Co., 140 N. C., 477.
Worley v. Laurel River Logging Co., 73 S. E. Rep., 107.

Thayer, Judge, in delivering the opinion in the case of *Southern P. Co. v. Yeargan*, 109 Fed., at page 441, uses this language:

> "It is manifest, we think, that employees ought not, in all cases, to be regarded as having voluntarily assumed the risk of injury, merely because

> they remained in service with knowledge that certain implements or appliances are out of repair, or that there is a defect in equipment. If the danger of being injured by the use of defective implements, or because of insufficient equipment, is both imminent and obvious, he who makes use of the same could not be heard to complain. . . . But if the master places defective tools in the hands of the servant, or insufficient appliances and requires them to use it, the risk incurred by such injury is not so imminent that persons of ordinary prudence would under the circumstances of the case be inclined to incur it, it would seem that the master ought not to be absolved of liability for his neglect of duty, merely because the servant was aware of the defect before being hurt and did not retire from the service. . . . Whether he acted with ordinary prudence in the defendant's service, with the knowledge which he had acquired of the insufficient equipment of the helper engines, is the true test by which to determine whether he assumed the particular risk and released the railroad company from liability for the nonperformance of the duty to supply proper equipment which the law devolved upon him." Citing numerous cases.

McCall, Judge, in rendering the opinion in the case of *Wright v. Yazoo, etc., R. R.*, 197 Fed., page 96, in construing the Employers' Liability Act of 1908, says:

> "It is not permissible, in my judgment, to hold that the employee assumes the risk of his employment which arises from the negligence of the officers, agents, or employees of the carrier. It is insisted that the Act provides that he shall not be held to have assumed the risk in cases only where the violation by the common carrier of any statute enacted for the safety of employees contributed to the injury, the maxim, *"Expressio unious est exclusio alterious,"* applies. I do not think this insistence sound, or that it should be sustained.
>
> "As I construe the Act, the risk that the employee

> now assumes is the ordinary dangers incident to his employment, which does not include, since the passage of this Act, the assumption of risk incident to the negligence of the carrier's officers, agents, or employees or any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

Gray, Chief Justice, in *Deninger v. American Locomotive Co.*, 185 Fed., at page 32, says:

> "Whatever the risk assumed by the servant in entering upon his employment may be, the one risk he does not assume is that arising from the negligence of his employer. Whether the servant in a given case has contributed by his own negligence to the negligence of the master, causing the injury complained of, is another question to be determined against him only by evidence sufficient to rebut the presumption of due care on the servant's part. It would be a question for the jury to say whether the deceased was to be considered in fault and to have contributed to the accident."

This Case was Properly Submitted to the Jury Upon the Doctrine of the Ideal Prudent Man.

In *Kane v. Northern Cen. Railroad Co.*, 112 U. S., 91, Kane, who was an employee, reported to the superintendent that a step was off of a car, and during the same day in going from one car in the train to another, he stepped at the very place where the step was missing and was injured. The court held, upon the question of assuming the risk, after discovering the danger and remaining in the employment was for the jury, regard being had to all the circumstances of the particular occasion; the court saying:

> "An employee is guilty of contributory negligence which will defeat his recovery only when such injuries substantially result from dangers so ob-

> vious and threatening that a reasonably prudent man, under similar circumstances, would have avoided them if in his power to do so."

In *Snow v. Railroad,* 8 Allen, 441, and cited in approval in *Gardner v. Railroad,* 150 U. S., 349, Snow was injured while uncoupling cars by reason of a defective roadbed, and the court lays down the doctrine in effect that the court cannot rule as a matter of law that the servant was careless, but the case should be submitted to the jury, although he continued in the employment of the company after he knew of the defect.

This question is discussed in White on Pers. Inj. on Railroads, vol. 1, sec. 370:

> "As it would be permitting the employer to take advantage of his own neglect, or wrongful act to hold that he could, by failure to inspect or repair an engine or car, permit it to become defective or dangerous, that his employees assumed the risk of injury therefrom, it is quite generally held that an employee does not assume the risk of injuries from a defective car or engine, where negligence could be chargeable to the employer as the cause of such defective or dangerous condition." Citing *Omeila v. Kansas City Railroad Co.,* 21 S. W., 503; *Gotlieb v. New York, etc., Railroad Co.,* 3 N. E., 344; *Biles v. Railroad,* 139 N. C., 528.

In section 377 of the same volume, the writer continues:

> "It is a part of the implied obligation on the part of the employer that he will not subject his employee, through his own fraud, negligence or malice, to any greater or additional risks than those which fairly and properly belong to the particular service in which the employer is engaged. A risk made hazardous by the negligence of the employer is one which could not have been prevented by reasonable care on his part, nor is it one that an employee assumes on entering into the employment. Where

the employer fails to furnish suitable or safe machinery or appliances, or to employ careful and prudent employes in the service he is engaged in, the risks resulting from such failure on his part are extra-hazardous and are not assumed by his employee. Employees do not assume the extra hazards that arise from the employers' failure to adopt reasonable rules and regulations for his business, or by failure to inspect and repair machinery and appliances, or to inspect the road-bed and track and for such extra hazards of the employment, an action generally will lie."

In support of the foregoing principles, the court is referred to the cases of

Lake Shore Railroad Co. v. McCormick, 79 Ind., 440.
Craig v. Chicago Railroad Co., 91 Mich., 634.
Consolidated, etc. Co. v. Heanni, 35 N. E., 162.
Bridgers v. St. Louis Railroad Co., 6 Mo. App., 389.
Perkins v. South Carolina Railroad Co., 48 S. C., 364.
Fosburg v. Railroad, 94 N. Y., 374.
Shearman & Redf. on Neg., vol. 1, sec. 194.
Gotlich v. Railroad, 100 N. Y., 467.
Mann v. Railroad, 111 N. C., 482.
Hudson v. Railroad, 104 N. C., 491.
Hemareck v. Railway, 186 Fed., 142.
Barber Asphalt Paving Co. v. Austin, 186 Fed., 443.

INVITED ERROR.

In a former part of this brief, we have contended that if the trial judge submitted this case to the jury upon the wrong theory, or in any manner confused the defenses of *assumption of risk* and *contributory negligence,* he did so at the instance and under the direction of the Plaintiff in Error. We again urge this position as a reason for affirming the judgment and opinion of the Supreme Court of North Carolina.

"A party who procures or acquiesces in the rulings under which a trial is conducted thereby waives the right to object to them." *New York Elev. R. Co. v. Fifth Natl. Bank,* 135 U. S., 432; 34 L. Ed., 231.

"Plaintiff cannot complain of an error in a ruling which was made at his request, and to the prejudice of the defendant." *Avendano Bros. v. Gay,* 8 Wall, 376; 19 L. Ed., 422.

This cause having been fairly submitted to the jury upon issues agreed to by the Plaintiff in Error, and the law applicable to the case having been given to the jury by the trial court, and the theory of the Plaintiff in Error having been adopted by the court, it ought not now to be heard to complain and the order and judgment of the Supreme Court of North Carolina should be affirmed.

Respectfully submitted,

WILLIAM C. DOUGLASS,

Counsel for Defendant in Error.

COMMERCIAL PRINTING COMPANY. THE BRIEF AND RECORD PRINTERS.

FILED
FEB 23 1914
JAMES D. MAHER
CLER

IN THE

Supreme Court of the United States

OCTOBER TERM, 1913

SEABOARD AIR LINE RAILWAY
Plaintiff in Error
vs.
JAMES T. HORTON
Defendant in Error

No. 691

DEFENDANT IN ERROR'S MOTION TO DISMISS THE WRIT OF ERROR UNDER RULE 21 OF THE RULES OF THE SUPREME COURT OF THE UNITED STATES. NOTICE TO PLAINTIFF IN ERROR, AND BRIEF IN SUPPORT OF SAID MOTION.

WILLIAM C. DOUGLASS
Counsel for Defendant in Error

IN THE

Supreme Court of the United States

OCTOBER TERM, 1913

SEABOARD AIR LINE RAILWAY,
Plaintiff in Error.
vs.
JAMES T. HORTON,
Defendant in Error.

No. 691

ON WRIT OF ERROR TO THE SUPREME COURT OF NORTH CAROLINA.

MOTION ON BEHALF OF JAMES T. HORTON, DEFENDANT IN ERROR, TO DISMISS THE WRIT OF ERROR FOR THE FAILURE OF THE PLAINTIFF IN ERROR TO FILE SUCH BRIEF AS IS REQUIRED BY THE RULES OF THE SUPREME COURT OF THE UNITED STATES.

Comes now the Defendant in Error, James T. Horton, by his counsel, William C. Douglass, appearing in his behalf, and moves the Court to dismiss the writ of error in the above entitled cause for the following reasons, to wit:

1. For that the Plaintiff in Error has not complied with RULE 21, section 2, subsection 1, of the Rules of the Supreme Court of the United States, in that it has failed to file, within the time required by Rule 21, subsection 1, a brief in this cause containing "a concise abstract, or statement of the case, presenting succinctly the questions involved and in the manner in which they are raised."

2. For that the Plaintiff in Error has not complied with RULE 21, section 2, subsection 2, of the Rules of the Su-

preme Court of the United States, in that it has failed to file, within the time required by said Rule 21, subsection 1, a brief containing a specification of the errors relied upon, setting out separately and particularly each error asserted and intended to be urged; and in that it has failed to set out the full substance of the evidence admitted or rejected; and in that it failed to set out in *totidem verbis* the instructions given or refused which are made the basis for exception.

WILLIAM C. DOUGLASS,
Counsel for Defendant in Error.

NOTICE TO SEABOARD AIR LINE RAILWAY.

To Seaboard Air Line Railway, Plaintiff in Error, and Benjamin Micou, Esq., its Counsel:

Please take notice, that on....., the..... day of February, 1914, at the opening of court, or as soon thereafter as counsel can be heard, the motion of which the foregoing is a copy, will be submitted to the Supreme Court of the United States for the decision of the Court thereon.

WILLIAM C. DOUGLASS,
Counsel for Defendant in Error.

Service of a copy of the foregoing motion, notice and copy of brief acknowledged and accepted, this ..... day of February, 1914.

SEABOARD AIR LINE RAILWAY,
Plaintiff in Error.

By.....
Counsel.

In the

SUPREME COURT OF THE UNITED STATES,

October Term, 1913.

SEABOARD AIR LINE RAILWAY,
Plaintiff in Error,
vs.
JAMES T. HORTON,
Defendant in Error.
No. 691.

BRIEF ON MOTION TO DISMISS THE WRIT OF ERROR FOR PLAINTIFF IN ERROR'S FAILURE TO FILE A BRIEF IN ACCORDANCE WITH THE RULES OF THE SUPREME COURT OF THE UNITED STATES.

On the sixth day of December, 1913, the Plaintiff in Error filed a brief in this cause, entitled "BRIEF OF PLAINTIFF IN ERROR IN REPLY TO MOTIONS TO DISMISS THE WRIT OF ERROR." This brief does not contain (1) a concise abstract, or statement of the case; (2) nor does it present succinctly the questions involved and in the manner in which they are raised; (3) nor does it contain a specification of the errors relied upon; (4) nor does it set out separately and particularly each error asserted and intended to be urged; (5) nor does it set out the full substance of the evidence admitted or rejected; (6) nor does it set out in *totidem verbis* the instructions given or refused which are made the basis of exception; all of which is required by the rules of the Supreme Court of the United States.

No other brief has been filed by the plaintiff in error in this cause within the time required by the rules of this Court.

Rule 21 of the Rules of the Supreme Court of the United States reads as follows:

> "1. The counsel for plaintiff in error or appellant shall file with the Clerk of the Court, at least three weeks before the case is called for argument, thirty copies of a printed brief * * *
>
> "2. This brief shall contain, in the order here stated:
>
> "(1) A concise abstract, or statement of the case, presenting succintly the questions involved and the manner in which they are raised.
>
> "(2) A specification of the errors relied upon, which, in cases brought up by writ of error, shall set out separately and particularly each error asserted and intended to be urged * * * When the error alleged is to the admission or rejection of evidence, the specification shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the Court, the specification shall set out the part referred to *totidem verbis*, whether it be instructions given or instructions refused * * *
>
> "5. When, according to this rule, a plaintiff in error or an appellant is in default, the case may be dismissed on motion * * * "

The defendant in error therefore moves the Court to dismiss the writ of error for the failure on the part of the plaintiff in error to comply with the rules of the Court in the particulars hereinbefore stated.

Respectfully submitted.

WILLIAM C. DOUGLASS,
Counsel for Defendant in Error.

EDWARDS & BROUGHTON PRINTING CO RALEIGH

[redacted]

IN THE

Supreme Court of the United States

OCTOBER TERM, 1913

SEABOARD AIR LINE RAILWAY,
Plaintiff in Error,
vs.
JAMES T. HORTON,
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No. 691

ON WRIT OF ERROR TO THE SUPREME COURT OF NORTH CAROLINA.

MOTION ON BEHALF OF JAMES T. HORTON, DEFENDANT IN ERROR, TO DISMISS THE WRIT OF ERROR FOR WANT OF JURISDICTION.

Comes now the Defendant in Error, James T. Horton, by his counsel, William C. Douglass, appearing in his behalf, and moves the court to dismiss the writ of error in the above-entitled cause for want of jurisdiction upon the grounds hereinafter set forth in the brief filed herein.

WILLIAM C. DOUGLASS,
Counsel for Defendant in Error.

NOTICE TO SEABOARD AIR LINE RAILWAY.

To Seaboard Air Line Railway, Plaintiff in Error, and Benjamin Micou, Esq., its counsel.

Please take notice that on Monday, the 8th day of December, 1913, at the opening of the court, or as soon thereafter

as counsel can be heard, the motion of which the foregoing is a copy will be submitted to the Supreme Court of the United States for the decision of the court thereon.

Attached hereto is a copy of the motion to dismiss, and the brief to be submitted in support thereof.

WILLIAM C. DOUGLASS,
Counsel for Defendant in Error.

Service of a copy of the above-mentioned motion, notice and copy of brief, acknowledged and accepted this .... day of ....., 1913.

....,
Plaintiff in Error.

By....,
Counsel.

In the

SUPREME COURT OF THE UNITED STATES,

October Term, 1913.

SEABOARD AIR LINE RAILWAY, *Plaintiff in Error,* vs. JAMES T. HORTON, *Defendant in Error.*	No. 691.

BRIEF ON MOTION TO DISMISS THE WRIT OF ERROR FOR WANT OF JURISDICTION.

THERE IS NO RETURN DAY SPECIFIED IN THE WRIT OF ERROR OR CITATION.

The writ of error will be found on pages 109-10, and the citation on pages 110-11 of the printed record. The writ of error and the citation were made returnable to the Supreme Court in general terms, without naming any day or even any term at which the defendant in error was required to appear.

Section 5, Rule 8, of the Rules of the Supreme Court of the United States reads as follows:

> "All appeals, writs of error, and citations must be made returnable not exceeding thirty days from the day of signing the citation, whether the return day fall in vacation or in term time, and be served before the return day."

Under this rule the Defendant in Error contends that this Court can acquire no jurisdiction of the writ of error, for that there is no day specified for the return of the writ of error and citation.

Chief Justice Taney, in delivering the opinion in the case of *Carroll v. Dorsey*, 20 How., 210; 15 L. E., 803, says:

> "The Act of 1789, section 22, requires that the writ of error should be made returnable on a certain day therein named; and, indeed, upon common-law principles, a certain return day in a writ of error is essential to its validity. There is, therefore, no process by which the case is legally brought before this Court, and consequently we have no jurisdiction over it."

The Defendant in Error therefore moves to dismiss the writ of error for want of jurisdiction.

Respectfully submitted,

WILLIAM C. DOUGLASS,
Counsel for Defendant in Error.

COMMERCIAL PRINTING COMPANY. THE BRIEF AND RECORD PRINTERS.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1913.

SEABOARD AIR LINE RAILWAY,
Plaintiff in Error,
v.
JAMES T. HORTON,
Defendant in Error.
No. 691

Brief of Plaintiff in Error in Reply to Motions to Dismiss the Writ of Error.

HILARY A. HERBERT,
BENJAMIN MOSS,
RICHARD F. WHITELEY,
MURRAY ALLEN,
Counsel for Plaintiff in Error.

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IN THE

Supreme Court of the United States.

October Term, 1913.

SEABOARD AIR LINE RAILWAY,
Plaintiff in Error,
v.
JAMES T. HORTON,
Defendant in Error.

No. 691.

ON WRIT OF ERROR TO THE SUPREME COURT OF NORTH CAROLINA.

BRIEF OF PLAINTIFF IN ERROR IN REPLY TO MOTIONS TO DISMISS THE WRIT OF ERROR.

Statement.

The defendant in error makes two separate motions to dismiss for want of jurisdiction.

One motion, the last one made, is upon the ground that the writ of error and citation were made returnable to the Supreme Court in general terms, without naming any date or even any term at which the defendant in error was required to appear (p. 3 of defendant in error's brief on this subject).

The writ of error is found pages 109 to 110 Record.

It was allowed by Mr. Justice Lamar (p. 110, Rec.) and is dated August 4, 1913, returnable to the Supreme Court of the United States within thirty days from its date (p. 110, Rec.)

The citation (pp. 110–111, Rec.) is dated August 4, 1913, and cites defendant in error to appear and answer within thirty days from the date of the citation.

This brings the return both of the writ and citation into strict conformity with Sec. 5 of Rule 8 of the Rules of the Court. The writ was duly and properly served. If the facts were not as recited above before making the motion to dismiss on this ground defendant in error had appeared and moved to dismiss the writ of error for want of jurisdiction, or to affirm the opinion and judgment rendered by the Supreme Court of North Carolina, and to have the case transferred to the summary docket as provided for by this court in an amendment to Rule 6. He thereby waived any right he might have had to question the proper service of process.

Knox v. *Summers*, 3 Cranch, 496;
Pollard v. *Dwight*, 4 Cranch, 421;
Gracie v. *Palmer*, 8 Wheat. 699;
The Merino, 9 Wheat. 391;
Farrar v. *U. S.*, 3 Pet. 459;
Harkness v. *Hyde*, 98 U. S. 476.

The other motion made first, is to dismiss for want of jurisdiction and to affirm the judgment of the State Court, upon the ground that no Federal question was presented in the writ of error, and that no right, privilege or immunity under the act of Congress (the Employers' Liability Act) has been denied the plaintiff in error.

For convenience of the court the statute in full is set forth below.*

*"*Be it enacted by the Senate and House of Repre-*

Facts There Was Evidence to Sustain.

The action was brought by defendant in error, under the provisions of the Federal Employers' Liability Act, to recover damages for injury to his eye caused by the explosion of a water glass on a locomotive engine (p. 4, Rec.).

At the time of the injury he had been employed by the plaintiff in error as engineer for a period of six years, and as fireman for three or four years prior to his promotion. It appeared from the work reports, identified by him, that he first made a report on this engine on July 28th, after his return from a round trip requiring two days (p. 12, Rec. and p. 49, Rec.). The explosion of the water glass, of which he complains, occurred August 4th, upon his return from the third or fourth trip to Aberdeen (p. 13, Rec.). At the time of the explosion of the glass he had his face towards it, and was looking at the glass.

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sentatives of the United States of America in Congress assembled, that every common carrier by railroad while engaged in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia or any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he was employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and if none, then to the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or in-

The engine, No. 752, which he was operating, was equipped with a patented water glass, called the Buckner Water Glass, which was invented by an engineer on the Seaboard Air Line Railway, and which was so constructed that a thick guard glass was placed over the front of the water glass to protect the eyes of the engineer in the event the inner glass should explode. The engine was also equipped with an alternative method of determining the amount of water in the boiler by means of gauge cocks, which up to ten or twelve years ago was the only method in use (p. 30, Rec.). It was his duty, upon boarding his engine, to look at his water glass, and also to test his gauge cocks, the latter being three cocks placed at intervals on the front of the boiler, in order to see that both were in working order (pp. 20, 31, 37, 38, and 45, Rec.).

When the water glass was found to be missing it was the engineer's duty to shut off the valves and run the

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sufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"*Section 2.* That every common carrier by railroad in the Territories, the District of Columbia, the Panama Canal Zone, or other possessions of the United States, shall be liable in damages to any person suffering injury while he is employed by such carrier in any of said jurisdictions, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

engine with the gauge cocks (p. 30, Rec. and p. 31, Rec.).

On the morning that he was called to take this engine (he had prior to that been operating a possenger train) and use it in operating a freight train from Raleigh, N. C., to Aberdeen, N. C., he noticed before leaving Raleigh that there was no shield or guard on the water glass (p. 12, Rec.), without making complaint of the condition of the glass, he made the trip to Aberdeen and return (p. 12, Rec.). Upon his arrival in Raleigh at the end of his round trip, he made a written report of the condition of his engine upon forms provided for that purpose, and in accordance with the plaintiff in error's requirements he placed the reports on a file in the round house or put them in a box there for that purpose (p. 15, Rec.). This, according to defendant in error's evidence, was the way provided by the

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"*Section 3*. That in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this act to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided*, that no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

"*Section 4*. That in any action brought against any common carrier under or by virtue of any of the provisions of this act to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks

company for procuring repairs. George Steel, his witness, and a number of plaintiff in error's witnesses, said that these work reports were required to be in writing, that they were filed and distributed among the workmen for the purpose of making the required repairs. It appears in evidence that he made a written report on this engine at the return of each round trip, *and noted every defect in his engine except the absence of the guard glass* (p. 15, Rec. and pp. 49–52, Rec.). When asked by the Superintendent of the division on which he was employed, why he failed to report the absence of the guard, he said that *it was for reasons best known to himself* (p. 53, Rec.).

On August 4, 1910, while engaged in shifting cars at Apex, N. C., the defendant in error alleges that the water glass exploded and injured his eye (p. 13, Rec.). Immediately after the explosion Horton cut off the gauge glass at top and bottom, and the engine was operated to

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of his employment in any case where the violation by such common carrier of any statute enacted for the safety of the employees contributed to the injury or death of such employee.

"*Section 5.* That any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt himself from any liability created by this act, shall to that extent be void: *Provided*, that in any action brought against any such common carrier under or by virtue of any of the provisions of this act, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity, that may have been paid to the injured employee, or to the person entitled thereto on account of the injury or death for which said action was brought.

"*Section 6.* That no action shall be maintained under this act unless commenced within two years from the day the cause of action accrued.

Raleigh with the gauge cocks as the means of determining the amount of water in the boiler (p. 24, Rec.).

The guard glass referred to as part of the Buckner equipment is merely a thick piece of glass two or three inches wide, and eight or nine inches long, with a thickness of a quarter or three-eighths of an inch, according to defendant in error's testimony, and is detached from the gauge, being placed in slots arranged for the purpose of holding it (p. 12, Rec.). The Buckner gauge is not a complicated piece of machinery, but is a brass tube with an opening in front and containing a small glass tube. A thick piece of glass or two thin pieces of the proper size could be easily cut and placed in the slot by anybody with the slightest intelligence.

The defendant in error testified that "the shield is important as a protection to the engineer's eyes; that is all it is for." "I knew the shield was gone, and I knew it was put there for the safety of anybody on the engine" (p. 17, Rec.).

"*Section 7.* That the term 'common carrier' as used in this act shall include the receiver or receivers or other persons or corporations charged with the duty of the management and operation of the business of a common carrier.

"*Section 8.* That nothing in this act shall be held to limit the duty or liability of common carriers or to impair the rights of their employees under any other act or acts of Congress, or to affect the prosecution of any pending proceeding or right of action under the act of Congress, entitled 'An act relating to liability of common carriers in the District of Columbia and Territories, and to common carriers engaged in commerce between the States and between the States and foreign nations to their employees,' approved June eleventh, nineteen hundred and six.

"Approved April 22, 1908."

George Steele, a witness for the defendant in error, testified (pp. 44–45, Rec.):

"I have been an engineer on the Seaboard six or eight years. I am familiar with the duties of an engineer. It is his duty to see that his engine is in proper working order and properly equipped. He reports 30 minutes beforehand for that purpose. He is paid for that time. He is paid until he gets off duty. He is allowed 15 or 20 or 25 minutes from the time he cuts loose from his train. Engineers are supposed to inspect engines before they give them up and make out a work report in writing. It is required by the company to be in writing and signed by the engineer. That work report is filed in the round house, and the work distributed among different ones to have the defects remedied. It is the engineer's duty to report defects discovered in his cab and report them on his work report. When an engineer gets on his engine in the morning he tests the gauge cocks to see that they are working. He tests his gauge glass to see that it is in shape and in working order. The gauge cocks indicate how much water is in the boiler. You could operate the engine with gauge cocks alone without the water glass. The water glass is arranged so that if anything should happen you could cut it off, top and bottom; that cuts it clean out, so that it is impossible for it to explode. But with the steam on and the water on, and this guard glass gone, that inner tube is nothing but a thin tube of glass. Whatever pressure the engine carries is on there. Those glasses explode frequently. Nobody can tell when one is going to explode. One might last fifteen minutes and one thirty days. One has never exploded with me. They buzz a little when they are going to explode. The purpose of the guard glass is to protect anybody in the cab. It protects the engineer from explosion. Without the guard glass he is liable to

be injured by flying glass. On the line of road, if I discovered the guard glass was gone, I would report it in writing on the work report when I got in. It could be gotten by requisition from the store room. My duty would be to notify the foreman. It is the engineer's duty to report any defects they see on the engine in writing."

(pp. 44–45, Rec.)

The defendant in error alleges in his complaint that he was at the time of his injury engaged in interstate commerce, and brings his suit under the Federal Employers' Liability Act (p. 4, Rec.). In support of his allegations, plaintiff testified that the engine which he was engaged in operating was drawing a train containing cars of freight for points beyond the State of North Carolina (p. 12, Rec.).

Reply to Motion to Dismiss for Want of Jurisdiction.

Plaintiff was denied rights, privileges and immunities under the Federal Employers' Liability Act, and this gives jurisdiction.

This action was brought under the Federal Employers' Liability Act, being specifically referred to in the complaint, and the plaintiff in error pleaded in defense such matters as it thought available under the provisions of that act, particularly the defense of assumption of risk. As defining and illustrating the application of the law to the facts, plaintiff in error requested certain instructions, which we refer to in detail hereafter, all of which, of necessity, related to the construction and application of the Federal Act, because under the *Mondou* case (223 U. S. 1), no other law was applicable to the facts of this case. All of the defendant's special requests involved the construction of the act, and the court's instructions

to which exceptions were noted involved the construction of the act. Was assumption of risk a defense under the act? This question arose upon the very threshold of the case. If so, by what standard did the statute require it to be measured? To what extent is contributory negligence a defense under the act? How should the damage be measured? By what standard should the conduct of the defendant be measured in determining whether or not there had been negligence for which responsibility is created by the act?

Those questions were raised by the motion for judgment of non-suit and by request for peremptory instructions.

We submit that none of these questions should be decided without construing the Federal Act.

Certainly the Supreme Court of North Carolina regarded the construction of the act as involved in the decision of the appeal. The entire opinion is devoted to a discussion of the proper construction of Section 4 of the Federal Act. And *Chief Justice* Clark concurs:

> "On the further ground that the following paragraph in Sec. 4 of the Federal Employers' Liability Act, 'Such employe shall not be held to have assumed the risk of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employes contributed to the injury or death of such employes,' merely emphasizes the fact that in such cases there is no assumption of risk. It can not be construed, fairly, to be an implied provision that assumption of risk is a defense in all other cases."
>
> (p. 87, Rec.).

In the opinion of the court (p. 80, Rec.), Sec. 4 of the act in so far as it saved assumption of risk as a defense was construed to refer to assumption of the ordinary risks and risks of such character that a prudent man

would not assume them. This was a specific denial of defendant's right to have the defense of assumption of risk extended to all dangers even when created by the master's negligence, if the danger was known to and appreciated by the employee, and he continued to work without objection. *Texas, etc. R. Co.* v. *Harvey,* 228 U. S. 319.

This principle is not affected by defendant in error's testimony that he reported the defect and received a promise to repair, because the defendant produced evidence that no such complaint was made and no such promise given, and in determining the right of a party to have instructions given it is only necessary that they be based upon a view of the evidence which the jury would be justified in finding to be true.

We refer the court to Assignment of Error No. 12 (pp. 104–105, Rec.), as showing the manner in which plaintiff in error requested a construction of the Federal Act in conformity with its view, and the refusal of the trial court to give this instruction upon the issue of assumption of risk and referring it to contributory negligence, shows the denial of a right arising under the Federal statute, which in itself is sufficient to sustain the jurisdiction of this court.

In *St. Louis Iron Mountain & Southern Ry.* v. *McWhirter,* 33 Sup. Ct. Rep. 858, 229 U. S. 265, it is held that:

> 1. "A decision of the highest court of a State, which affirmed a judgment in favor of plaintiff in an action in which the right to relief was exclusively based upon the hours of service, act of March 4, 1907 (34 Stat. at L. 1416, chap. 2939, U. S. Comp. Stat. Supp. 1911, p. 1321), and the employers' liability act of April 22, 1908, (35 Stat. at L. 65, chap. 149, U. S. Comp. Stat. Supp. 1911, p. 1322), and in which, at the close of the evidence, defendant had requested the court to instruct the jury to find

> in its favor, necessarily involves an adverse determination of a Federal question, *i. e.*, defendant's right to be shielded from responsibility under those statutes when properly applied, and a writ of error will therefore lie from the Federal Supreme Court to the State court."

In *St. Louis Iron Mountain & Southern Railway Co.* v. *McWhirter*, 33 Sup. Ct. Rep. 858, 229 U. S. 265, Chief Justice White says:

> "While it is true, as we have said, that coming from a State court, the power to review is controlled by Rev. Stat. Sec. 709, yet where, in a controversy of a purely Federal character, the claim is made and denied that there was no evidence tending to show liability under the Federal law, such ruling when duly excepted to, is reviewable, because inherently involving the operation and effect of the Federal law."

In that case the court considered the alleged errors concerning the following subjects: First the refusal to give the binding instructions asked by the defendant; and, second, an instruction given over the objection and exception of the defendant concerning the act of Congress commonly known as the hours of service act, and in connection therewith a special charge on the same subject given by the court of its own motion which was excepted to by both parties.

(229 U. S. at p. 277.)

In the present case we have assignments of error of identically the same character. The plaintiff in error requested the trial court to instruct the jury as follows: "The Court charges you that if you believe the evidence the plaintiff was not injured by any negligence on the part of the defendant and you will answer the first issue

"No." (Assignment of error No. 25, Printed Record, page 108.) The plaintiff in error also requested special instructions on the issues of assumption of risk and excepted to the court's refusal to give these instructions, and noted exceptions to the instructions given by the court of its own motion on the issues of negligence, assumption of risk, contributory negligence and damages.

As illustrative of the requests of plaintiff in error for instructions to the jury, *which were refused by the trial court*, we quote:

Assignment of Error No. 10.

"The Court charges you that the statute of North Carolina, Revisal Section 2646, abolishing assumption of risk as defense to any action brought against a railroad company by one of its employees, has no application in this case, and if you find that the plaintiff assumed the risk of injury from the explosion of the water glass, then you will answer the second issue 'Yes.'"

p. 104, Rec.

"The right of the plaintiff to recover damages in this action is to be determined by the provisions of the Federal Employers' Liability Act enacted by Congress at the session of 1908, and the court charges you that if you find by a preponderance of evidence that the water glass on the engine on which plaintiff was employed was not provided with a guard glass and the condition of the glass was open and obvious and was fully known to the plaintiff and he continued to use such water glass with such knowledge and without objection, and that he knew the risk incident thereto, then the court charges you that the plaintiff voluntarily assumed the risk incident to such use, and you will answer the second issue 'Yes.'"

"The court gave this instruction as applicable to

the issue of contributory negligence, and instead of the words 'Then the court charges you that the plaintiff voluntarily assumed the risk incident to such use, and you will answer the second issue "Yes,"' used the words 'then the court charges you that the plaintiff is guilty of contributory negligence, and you will answer the third issue "Yes."'

"The refusal to give this instruction as requested and to the modification plaintiff in error excepts."

p. 104 and 105, Rec.

The latter instruction as applicable to assumption of risk had the direct support of the following cases decided by this court:

Butler v. *Frazee*, 211 U. S. 459;

Railroad v. *McDade*, 191 U. S. 64;

Railroad v. *Archibald*, 170 U. S. at pages 671 and 672;

T. & P. Railroad v. *Harvey*, 228 U. S. 319.

It was error to confuse assumption of risk and contributory negligence.

Schlemmer v. *R. R.* 220 U. S. 590;

Railroad v. *McDade*, 191 U. S. 64.

As illustrative of the exceptions to the trial court's instructions on the issue of assumption of risk, we quote:

"There has been no statute provided as applies to this glass water gauge which has been called to the attention of the court, so that leaves it open to the rights which the plaintiff might have under the law of this State, and the question of assumed risk, as has been argued by one, if not more of counsel, grows out of the contractual relation between plaintiff and defendant."

(p. 105, Rec.)

"He does not assume the risk incident to the

negligence of his employer in providing machinery and appliances with which he has to work."
(pp. 105–106, Rec.)

"And the same rule applies if the use of the glass without the shield was not so obviously dangerous as to cause a reasonably prudent man to stop the use of it, his going on and using it, of itself, would not be assuming the risk in the use of it."
(p. 106, Rec.)

These instructions demonstrate the fact that the trial court regarded the rule of assumption of risk, as in force in North Carolina, as binding upon the jury, and such instructions denied plaintiff in error a proper construction of the Federal Act in making the question of assumption of risk depend upon whether the danger was so obvious that a prudent man would not assume the risk.

In the following instruction the trial court confused assumption of risk and contributory negligence as defenses under the Federal Employers' Liability Act:

"That is governed largely by the same rules as applied to the question of assumption of risk. Did he continue to use the glass gauge when it was so obviously dangerous that a reasonably prudent man careful of himself would not do it? Was the danger so apparent that a reasonably prudent man would cease to use that and use the other gauge? If so, it would be your duty to answer the third issue 'Yes.'"
(p. 106, Rec.)

"If you find by the preponderance of the evidence that the water glass by which the plaintiff was injured was not provided with a guard glass and the condition of the water glass was open and obvious, and was fully known to the plaintiff, and he continued to use such water glass with such knowledge

> and without objection, and knew the risk incident thereto, then the court charges you that the plaintiff was guilty of contributory negligence, and you will answer the third issue 'Yes.'"
> (p. 106, Rec.)

As stated above, it was error to confuse the two defenses. This error was most prejudicial to plaintiff in error because of the different effect of an affirmative answer to the issues. If the issue of assumption of risk had been answered "Yes," defendant in error's right to recover would have been destroyed, while such answer to the issue of contributory negligence merely resulted in diminishing damage.

As illustrative of the exceptions to the instructions of the trial court upon the amount of damages to which defendant in error would be entitled under the Federal Employers' Liability Act, we quote:

> "But if you should answer the third issue 'Yes' that the plaintiff was guilty of contributory negligence, then the defendant would be entitled to have a set off against any damages which he otherwise might recover. But if you answer it 'No,' then give him the full measure of his injuries."
> (p. 106, Rec.)

> "If you come to the question of damages, it is your duty in assessing damages to give the plaintiff a just compensation for the injury which he has received to compensate him for the physical and mental pain and suffering occasioned by the injury, if any, the loss of time, if any, resulting from injury, his lessened capacity, if any, to earn a livelihood, the probable extent and duration of his injury, its conconsequence upon his earning capacity and suffering, whether his suffering is to continue or not; and in one sum you will estimate his damages in dollars and cents, from which you will deduct, if you find

he is guilty of contributory negligence, such amount as in your judgment should be deducted on that account from his actual damages."

(p. 106, Rec.)

In *Gulf, etc. Ry. Co.* v. *McGinnis*, 228 U. S. 173, which was tried under the Federal Employers' Liability Act, the Federal question upon which the judgment of the Court of Civil Appeals of Texas was reversed, related to an instruction of the trial court upon the issue of damages. The jurisdiction of the Supreme Court to review the case was not questioned either by counsel or by the court.

As illustrative of the exceptions to the trial court's instructions on the issue of negligence, we quote:

"If you find upon the evidence that it was turned over to him without the guard, and if you further find from the evidence that the guard was a proper safety provision, for the use of that gauge, and that it was unsafe without it, then the defendant did not furnish him a safe place, and a safe appliance to do his work, and if it remained in that condition it was continuing negligence on the part of the defendant, and if he was injured in consequence thereof, if you should so find by the greater weight of the evidence you should answer the first issue 'Yes.'"

(p. 108, Rec.)

"It is the duty of the defendant under this act to furnish the plaintiff safe, sound and suitable machinery, such as was reasonably safe, if the jury should find from the evidence that the defendant negligently furnished plaintiff an unsafe and unsound water glass, as described in the complaint, and the plaintiff was injured on account of such negligent failure to furnish such safe and sound water glass, you will answer the first issue 'Yes,' provided you find that he was injured and that the failure to

furnish this safe water glass was the proximate cause of the injury."
(p. 108, Rec.)

Duty.

"It is not the duty of a master to provide safe, sound and suitable appliances for the use of servants, but only to use ordinary care to do so."
Zinc Co. v. *Martin's Admr.*, 93 Va. 791.

The master's duty is to exercise the care which the exigency reasonably requires in furnishing such machinery as is adequate and suitable. In *Hough* v. *Railway Co.* 100 U. S. 213, which is authority for this position, Mr. Justice Harlan quotes from Wharton on Negligence:

"The question is that of duty; and, without making the unnecessary and inadequate assumption of implied warranty, it is sufficient for the purpose of justice to assert that it is the duty of an employer inviting his employees to use his structure and machinery, to use proper care and diligence to make such structure and machinery fit for use."
(pp. 219 and 220.)
See also *Washington, etc. R. Co.* v. *McDade*, 135 U. S. at p. 574.

It is held by the Supreme Court of Indiana to be error to instruct the jury "that it is negligence to use defective machinery"; that the employer "is only liable for the failure to employ ordinary care and diligence in the selection and use of machinery."

L. & N. R. R. v. *Orr*, 84 Ind. 50.
Kampe v. *Brewing Asso.*, 59 Mo. App. 277.
Wonder v. *B. & O. R. R. Co.* 32 Md. 411.

In this case is clearly involved the right of the plaintiff in error to be shielded from responsibility under the

Federal Employers' Liability Act, because when properly applied to the facts as presented by the plaintiff in error, no liability on its part from the statute would result.

St. Louis, etc. Ry. Co. v. *McWhirter*, *supra*.

Ry. v. *Hesterly*, 33 Sup. Ct. Rep. 803.

In *St. Louis & Iron Mountain Ry.* v. *Taylor*, 210 U. S. 292, the basis of the jurisdiction of this court is stated as follows:

> "The judicial power of the United States extends 'to all cases, in law and equity, arising under this Constitution, the laws of the United States and treaties made, or which shall be made, under their authority.' Article III, Section 2, Constitution. The case at bar, where the right of action was based solely upon an act of Congress, assuredly was a case, 'arising under * * * the laws of the United States.' It was settled, once for all time, in *Cohens* v. *Virginia*, 6 Wheat. 264, that the appellate jurisdiction, authorized by the Constitution to be exercised by this court, warrants it in reviewing the judgments of State courts so far as they pass upon a law of the United States. It was said in that case (p. 416): 'They (the words of the Constitution) give to the Supreme Court appellate jurisdiction in all cases arising under the Constitution, laws, and treaties of the United States. The words are broad enough to comprehend all cases of this description, in whatever court they may be decided;' and it was further said (p. 379): 'A case in law or equity consists of the right of the one party, as well as the other, and may truly be said to arise under the Constitution or a law of the United States, whenever its correct decision depends on the construction of either.' But the appellate jurisdiction of this court must be exercised 'with such exceptions and under such regulations as the Congress shall make.' Article III, Section 4, Constitution. Congress has regulated and limited the appellate jurisdiction of this court

over the State courts by section 709 of the Revised Statutes, and our jurisdiction in this respect extends only to the cases there enumerated, even though a wider jurisdiction might be permitted by the constitutional grant of power. *Murdock* v. *Memphis*, 20 Wall. 590, 620. The words of that section material here are those authorizing this court to reexamine the judgments of the State courts 'where any title, right, privilege, or immunity is claimed under * * * any statute of * * * the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed under such * * * statute.' There can be no doubt that the claim made here was specifically set up, claimed, and denied in the State courts. The question, therefore, precisely stated, is whether it was a claim of a right or immunity under a statute of the United States. Recent decisions of this court removed all doubt from the answer to this question. *McCormick* v. *Market Bank*, 165 U. S. 538; *California Bank* v. *Kennedy*, 167 U. S. 362; *San Jose Land Water Co.* v. *San Jose Ranch Co.*, 189 U. S. 177; *Nutt* v. *Knut*, 20 U. S. 12; *Rector* v. *City Deposit Bank*, 200 U. S. 405; *Illinois Central Railroad* v. *McKendree*, 203 U. S. 514; *Eau Claire National Bank* v. *Jackman*, 204 U. S. 522; *Hammond* v. *Whittredge*, 204 U. S. 538. The principles to be derived from the cases are these: Where a party to litigation in a State court insists, by way of objection to or requests for instructions, upon a construction of a statute of the United States which will lead, or, on possible findings of fact from the evidence may lead, to a judgment in his favor, and his claim in this respect, being duly set up, is denied by the highest court of the State, then the question thus raised may be reviewed in this court. The plain reason is that in all such cases he has claimed in the State court a right or immunity under a law of the United States and it has been denied to him. Jurisdiction so clearly warranted by the Constitution and so explicitly conferred by the act of Congress needs no

> justification. But it may not be out of place to say that in no other manner can a uniform construction of the statute of the United States be secured, so that they shall have the same meaning and effect in all the States of the Union."

Tested by this standard it seems to us that the jurisdiction in our case is beyond question.

In *Schlemmer* v. *Buffalo, Rochester, etc. Ry.* 205 U. S. at page 1, plaintiff brought suit to recover damages for the death of her intestate while trying to couple a shovel car to a caboose. A non-suit was directed at the trial and the Supreme Court of Pennsylvania sustained the judgment on the ground of deceased's contributory negligence. The Federal Statute applicable to the facts, known as the safety appliance act, provides in section 8 that any employee injured by any car in use contrary to the provisions of the act shall not be held to have assumed the risk thereby occasioned, although continuing in the employment of the carrier after the unlawful use had been brought to his knowledge. The United States Supreme Court held the case to be one within its jurisdiction because of the evident confusion of the trial court and the Supreme Court of Pennsylvania in applying the principles of contributory negligence and assumption of risk. Referring to the probability that the rights of the plaintiff under the statute had been sacrificed by charging him with assumption of risk under another name, Mr. Justice Holmes says:

> "We can not help thinking that this has happened in the present case, as well as that the ruling upon Schlemmer's negligence was so involved with and dependent upon erroneous views of the statute that if the judgment stood the statute would suffer a wound."
>
> p. 13.

In the present case we have beyond question a plain confusion of the rights of the plaintiff in error under the defenses of assumption of risk and contributory negligence and by the action of the trial court, affirmed by the Supreme Court of North Carolina, the plaintiff in error has been denied a proper construction of the Federal Act in its relation to the two defenses. The trial court held that in an action tried under the Federal Employer's Liability Act assumption of risk is a defense and then proceeded to instruct the jury erroneously as to this defense. The Supreme Court in reviewing the action of the trial court held that the construction of assumption of risk as adopted by the trial court was in accord with the decisions of the Supreme Court of the United States on this subject.

The State court recognized the federal question, and recognized the right of plaintiff in error to have the defense of assumption of risk determined by the Federal decisions but held that the plaintiff in error had received the full benefit of this right. In the opinion of the court, Allen, J. says:

> "We will assume that the defendant is entitled to the benefit of the doctrine of assumption of risk as declared by the Supreme Court of the United States, and will undertake to apply that doctrine to this case."

The plaintiff in error contended, and presents argument and authority for its position herein, that the trial court entirely failed to apply the doctrine of the Supreme Court of the United States with respect to assumption of risk in charging the jury, and the Supreme Court of North Carolina does not correctly state the doctrine of this court in affirming the judgment.

The *Schlemmer* case was again before the court and is

reported in 220 U. S. 590. This court upholds the decision of the Supreme Court of Pennsylvania sustaining a judgment of non-suit upon the ground that plaintiff's intestate by his own negligence contributed to the injury which caused his death. In the opinion of this court the safety appliance act is construed as abolishing assumption of risk, but leaving contributory negligence as a defense to an action tried under that act. The court's jurisdiction is said by Mr. Justice Day to rest upon this question, "Did the trial and judgment deprive the plaintiff in error of rights secured by the Federal Statute?"

In *Seaboard Air Line Ry.* v. *Duval*, 225 U. S. 483, *Mr. Justice* Lurton delivered the opinion of the court and says:

> "This action was brought under an act of Congress. If the act has been erroneously construed and exceptions saved, or if a particular construction to which the party asking was entitled was denied, a right has been denied under the statute, and the question may be reviewed by this court."

Plaintiff in Error Did Not Invite Error.

In its request for instructions plaintiff in error carefully avoided the confusion of the defenses of assumption of risk and contributory negligence because the distinction was so vitally important in view of the different effect of an affirmative answer to these issues. The defendant's requests on the issue of assumption of risk were based upon the decisions of the Supreme Court of the United States.

We recognized the distinction in the two defenses as stated by this court in the *Schlemmer* case, 220 U. S. 590.

Contributory negligence is not affected in any way by

reporting the defect and receiving a promise to repair, and in pleading contributory negligence the plaintiff in error makes no reference to a failure to report the absence of the guard glass. The allegations of section 3 of defendant's fourth defense are based upon the plaintiff's *negligently and carelessly* continuing the use of the water gauge when he was aware of the absence of the guard glass. In order to avail itself of contributory negligence as a partial defense in mitigation of damages it was necessary for the defendant to plead contributory negligence. The Revisal of North Carolina of 1905, Section 483, requires that contributory negligence must be pleaded by the defendant and the burden of proving such negligence is imposed by this statute upon the defendant. If the plaintiff in error pleaded defenses in any way contradictory such practice is specifically approved by the decisions of the Supreme Court of North Carolina.

Upton v. *R. R.* 128 N. C. 173.

The plaintiff in error pleaded contributory negligence in its answer in two aspects: 1st, that plaintiff used this guard glass carelessly and negligently, and 2d, that he used it in preference to an alternative way of operating his engine which was admitted to be safe.

In neither allegation is the question of a failure to report the defect referred to. The jury could find plaintiff guilty of contributory negligence whether he received a promise to repair or not. But in order for assumption of risk to operate as a defense, the jury must find the plaintiff did not report the defect, and did not receive a promise to repair. The same facts which may constitute contributory negligence, may also establish assumption of risk, provided the employee fails to report the defect, or reports the defect and does not receive a promise to repair. It was for the purpose of getting the benefit of the two

defenses that plaintiff in error embodied in its answer the sections relating to contributory negligence and assumption of risk. In relying upon either of these defenses, plaintiff in error did not waive the other.

As we have pointed out, in those jurisdictions in which the two defenses retain their common law vitality, the distinction between assumption of risk and contributory negligence is sometimes not material, but in the present case it becomes highly important because one is a partial and the other a total defense to the action.

The instruction requested by plaintiff in error quoted in defendant in error's brief, at top of page 9, is predicated upon a finding that *a man of ordinary prudence would not have used the gauge glass in its defective condition*. This distinguishes contributory negligence from assumption of risk, and made the instruction applicable solely to the third issue, which related to contributory negligence. It does not in any sense show that the plaintiff in error *elected* to have the question of defendant in error's continuing to work in the face of a known danger tried under the issue of contributory negligence. The plaintiff in error had the right to have the question of defendant in error's *conduct* in using the defective water glass tested by the rule of the prudent man. The very fact that the question of ordinary prudence in continuing to work in the face of a known danger is involved in the requested instruction shows that it did not relate to assumption of risk. It will be noted that the instruction quoted by defendant in error makes no reference to reporting the defect, which feature is embodied in all requests for instruction on the issue of assumption of risk.

The brief of defendant in error is incorrect in stating that the instruction on page 64 of the printed record under Exception No. 58, was given in response to plaintiff

in error's request on contributory negligence. The plaintiff in error not only did not ask such instruction but specifically excepted to his Honor's giving it, because it was directly contrary to a correct view of the law in that the court says that the question of contributory negligence "is governed largely by the same rule as applied to the question of assumption of risk." It is clear that the instruction as to the danger being so obvious that a reasonably prudent man careful of himself would not continue the work has reference to contributory negligence and would be incorrect when considered from the standpoint of assumption of risk. And if this part of the instruction is in accordance with requests by plaintiff in error, it was intended to apply to the issue of contributory negligence, and can not be construed as an election to have the question of defendant in error's continuing to work in the face of a known danger, without objection, tried under that issue when plaintiff in error requested specific and proper instructions upon the issue of assumed risk based upon a finding by the jury that defendant in error continued to work in the face of a known defect without objection.

> "Whenever the evidence suggests that the servant knew of the extraordinary risk which caused the accident the jury should be instructed regarding the legal consequences of such knowledge, as justifying the inference both of an assumption of risk and of contributory negligence."
>
> Labatt on Master & Servant (New Edition), Section 1221.

> "It is manifest that, where the facts disclosed warrant both the inference that the servant had assumed the risk or was guilty of contributory negligence in continuing to work, and the inference that he was lacking in proper care with respect to the act which was the immediate cause of the injury,

> *the proper course for the trial judge to follow is to differentiate the defenses clearly, and to explain by suitable language that they are cumulative in their operation.*"
>
> Labatt on Master & Servant (New Edition), Section 1222.

Of course, under the North Carolina doctrine by which the rights of a servant are tested by the rule of the prudent man, both with respect to contributory negligence and assumption of risk, the servant's want of care may be the only theory on which the employer can defeat liability. But the authorities show that the North Carolina doctrine is in force only in that State and in Missouri, and every other jurisdiction in the United States retains the common law doctrine of assumption of risk.

It will be found that the requested instruction, quoted at top of page 10 of the brief of defendant in error, is predicated upon the finding that defendant in error continued to use the defective water glass *after reporting the defect and after having received a promise to repair.* Independent of other facts this state of facts would relieve an employee from assumption of the risk, and cast the responsibility back upon the employer for a reasonable time.

In *Southwestern Brewery & Ice Co.* v. *Joseph Schmidt*, 226 U. S. 162, Mr. Justice Holmes says:

> "Whatever the difficulties may be with the theory of the exception (1 Labatt, Mast. & S. chap. 22, Section 423), it is the well-settled law that for a certain time a master may remain liable for a failure to use reasonable care in furnishing a safe place in which to work, notwithstanding the servant's appreciation of the danger, if he induces the servant to keep on by a promise that the source of trouble shall be removed."
>
> *Hough* v. *Texas*, 100 U. S. 213.

But the servant could not rely upon the promise to repair and would continue to assume the risk if the danger was such that a prudent man would not continue to work.

This instruction clearly does not apply to a finding by the jury that the defendant in error continued to work in the face of a known danger without objection, which would under the numerous authorities cited herein, require an affirmative answer to the issue of assumption of risk. The instruction quoted above was not intended to cover and did not cover the contention of plaintiff in error on the issue of assumption of risk, unless the jury should find the disputed fact that defendant in error reported the defect and was given a promise to repair.

There is a recognized exception to the rule that by complaint and promise to repair, the servant is relieved of assumption of risk for a reasonable time if he continues to use the defective instrumentality in reliance upon the promise of the master. If the danger is so imminent that a man of ordinary prudence would not continue the work, notwithstanding the promise to repair, the servant continues to assume the risk.

4 A & E Annotated Cases, p. 153;
Mining Co. v. *Paxton*, 150 Federal, 114;
Musser-Sauntry Land, Logging & Mfg. Co. v. *Brown*, 126 Federal, 141, per Sanborn and Van Devanter, Circuit Judges, concurring.

As to the defendant in error's motion to affirm, as we understand Par. 5 of Rule 6, such a motion can only be considered at this time upon the ground that it is manifest that the writ was taken for delay only, or that the questions on which the decision of the cause depends are so frivolous as not to need further argument. We believe that what has already been said shows that no such

ground exists. But in answering this part of the motion and to supplement what we have already said, we submit the following discussion of the principles of law applicable to the construction of this statute according to the contentions of the plaintiff in error in this case.

ERRORS IN INSTRUCTIONS.

Before considering these in detail we invite attention to

The Scope of the Act.

The able opinion of *Mr. Justice* Van Devanter, construing the act, states the departures made from the common law.

> Second Employers' Liability Cases, 223 U. S. 49–50.

It also, pp. 52–55, reviews in the most apt way the supremacy of a Federal law over State laws wherever the former law is operative.

The Federal Employers' Liability Act is in Conflict With the State Law of North Carolina.

There is a statute of North Carolina abolishing the common law doctrine of assumption of risk as it applies to the servants of a railroad, and in applying the doctrine of assumption of risk to other cases the decisions of that State are at variance with the decisions of the great majority of the States where the common law doctrine is in force. The statute is as follows:

> "Any servant or employee of any railroad company operating in this State who shall suffer injury to his person * * * by any defect in the machinery, ways or appliances of the company, shall be entitled to maintain an action against the company. Any contract, or agreement, express or implied, made by any employe of such company to

waive the benefit of this section shall be null and void."

Revisal Statutes of 1905 of North Carolina, Sec. 2646.

This statute, which is in derogation of common law, was construed by the Supreme Court of North Carolina in *Coley* v. *R. R.* 128 N. C. 534, as abolishing assumption of risk as a defense by a railroad sued for personal injury; and as construed, this statute is in direct conflict with the provisions of Section 4 of the Act of Congress, which abolishes assumption of risk only when the negligence of the master was due to the violation of a statute enacted for the safety of the servant. The Federal statute is supreme and supersedes the State statute on this subject.

The plaintiff in error requested an instruction that the statute of North Carolina was not applicable to the facts of the case, which was refused.

(p. 56, Rec.)

Congress Having Occupied the Field, the Federal Act Supersedes All State Law.

In construing the Hepburn Act this court said:

"By these provisions Congress has taken possession of the field of regulation, with the purpose, which we have already pointed out, to keep under the eye and control of the Commission the rates charged and the action of the railroad in regard to them, to secure their reasonableness and to secure their impartial application. The statute of North Carolina conflicts with these requirements. What they forbid the carrier to do the statute requires him to do, and punishes disobedience by successive daily penalties.

"We can not assume that it was without consideration of its necessity that Congress enacted § 2 of the Hepburn Act. It was no doubt the adaptation of experience to the exigencies of a practical problem,

> Congress coming to believe that the most effective way to prevent preferences in charges by carriers was to forbid them to 'engage or participate in the transportation of passengers or property' until they had fixed and proclaimed the rate to be charged therefor—a rate that would be not only for one shipper or shipment, but for all shippers and shipments; not for one time only, but for all times. The power of Congress to so provide can not be doubted. If the regulation be not exclusive, this situation is presented: If the carrier obey the State law, he incurs the penalties of the Federal law; if he obey the Federal law, he incurs the penalties of the State law. Manifestly one authority must be paramount, and when it speaks the other must be silent. We can see no middle ground. In so deciding we take no essential power from the States. The balances of the Constitution are only preserved and there is given to the States the power which is the States' and to Congress the power which belongs to Congress."
>
> *Southern Ry. Co.* v. *Reid*, 222 U. S. 442.

In *Adams Express Co.* v. *Croninger*, 226 U. S. 491, *Mr. Justice* Lurton makes this statement:

> "The answer relies upon the act of Congress of June 29, 1906 (34 Stat. at L. 584, Chap. 3591), as the only regulation applicable to an interstate shipment; and avers that the limitation of value, declared in its bill of lading, was valid and obligatory under the act. This constitutes the Federal question and gives the court jurisdiction."

In this case the Supreme Court holds that Congress has taken possession of the subject of the liability of a common carrier engaged in interstate commerce for loss or damage to freight, and that such legislation supersedes all State regulations. The court then proceeds to construe the Interstate Commerce act as not destroying the

common law right of a railroad to limit its liability by contract.

In more recent cases, and construing the act here in question, this court said:

> "It is true the original petition asserted a right of action under the laws of Kansas, without making reference to the act of Congress. But the court was presumed to be cognizant of the enactment of the Employers' Liability Act, and to know that with respect to the responsibility of interstate carriers by railroad to their employees injured in such commerce after its enactment it had the effect of superseding State laws upon the subject. *Second Employers' Liability Cases*, 223 U. S. 1, 53. Therefore the pleader was not required to refer to the Federal act, and the reference actually made to the Kansas statute no more vitiated the pleading than a reference to any other repealed statute would have done."
>
> *Mo., Kans. & Tex. Ry.* v. *Wulf*, 226 U. S. 575–6.

> "The cause of action sought to be enforced was not recognized at common law. *Michigan Central Railroad Co.* v. *Vreeland*, 227 U. S. 59, 67. It was essential, therefore, that it be based on some applicable statute. There was a Texas statute on the subject, and also the Federal one. Both could not occupy the same field, and they were unlike. The Texas statute gave the right of action to the 'surviving husband, wife, children and parents' and provided that it might be enforced by all of them or by one or more for the benefit of all, while the Federal statute vested the right of action in the deceased's 'personal representative, for the benefit of the surviving widow or husband and children of such employe; and, if none, then of such employe's parents; and, if none, then of the next of kin dependent upon such employe.' There were other points of dissimilarity, but they need not be noticed. If the Federal statute was applicable, the State statute

was excluded by reason of the supremacy of the former under the National Constitution. *Second Employers' Liability Cases*, 223 U. S. 1, 53; *Michigan Central Railroad Co.* v. *Vreeland, supra.*"

St. L. & San Francisco Ry. v. *Seale*, 229 U. S. 157–158.

Upon the subject of assumption of risk the common law right is preserved by the Employers' Liability Act, unless there has been a violation by the employer of a statute enacted for safety of the employee.

"The principles of the common law are operative upon all interstate transactions, except so far as they are modified by congressional enactment."

Western Union Tel. Co. v. *Call Publishing Co.* 181 U. S. 92;

Interstate Commerce Commission v. *Railroad, 145* U. S. 275.

It is settled by this court that acts of Congress must be construed in the light of the common law.

Standard Oil Cases, 221 U. S. 1;

American Tobacco Company Cases, 221 U. S. 106.

(*a*) This Section Is in Derogation of the Common Law and Must be Strictly Construed.

The Employers' Liability Act of 1906, declared unconstitutional, contained no provision with respect to assumption of risk. The present act as introduced in the House of Representatives, H. R. No. 17,036, contained a section, No. 6, identical with Sec. 4 of the act as finally passed, with this exception: that the employee was not to have been held to have assumed the risk of his employment in any case where "*the violation of law* by such common carrier contributed to the injury or death of such employee."

It was suggested by the representatives of the carriers who appeared before the committee that the effect of section 6 was to wipe out assumption of risk as a defense, because the law requires an employer to furnish his employees safe equipment, machinery and appliances, and to keep them in repair; and a failure to perform that duty would be a case "where the violation of law" by the carrier would contribute to the injury. Recognizing the force of this suggestion, Congress enacted section 4 of the present act, the difference in the two sections being indicated by italics:

Section 4. That in any action brought against any common carrier under or by virtue of any of the provisions of this act to recover damages for injuries to or the death of any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where *the violation by such common carrier of any statute enacted for the safety of employees* contributed to the injury or death of such employee.

The fact that this provision was incorporated in the act indicates that Congress regarded it necessary to make this specific declaration in order to abolish assumption of risk in such cases, and strengthens our position that it was not intended to affect the defense of assumption of risk in any other particular except as provided in section 4, and in section 1 in so far as it relates to the negligence of a fellow-servant.

The legislative history of an act of Congress is a proper aid to its construction.

11 Encyc. U. S. Supreme Court Reports, 143.

The legislative intention with regard to the defense of assumption of risk may be determined by considering the provisions of this statute by which contributory negligence as a bar to recovery is specifically destroyed and

such defense practically reduced to comparative negligence. Congress deemed it necessary in section 3 to use the words "shall not bar a recovery" in accomplishing this result. The simple manner in which similar language with respect to assumption of risk could have been employed in section 4 is apparent. But instead of using such positive language, Congress only destroys assumption of risk in certain specific instances, displaying an undoubted intention to leave it as an effective defense in every other case.

Another reason for this construction of the act is that the act of 1906 contained no provision with respect to assumption of risk. It follows that Congress did not treat the provisions of that act as affecting assumption of risk in any respect, because a specific declaration was regarded as necessary in cases in which a statute enacted for the servant's safety has been violated.

Statutes which abolish by express provision assumption of risk as a defense do not affect the defense of contributory negligence.

Schlemmer v. *Railroad*, 220 U. S. 590, Advance Sheets, July 1, 1911;

Railroad v. *Arrighi*, 129 Fed. 347.

The positive language used by Congress in the Federal Safety Appliance Act, section 8, illustrates the proper method of abolishing assumption of risk by legislative enactment. See also the language of the recent Employers' Liability Act of Ohio, set forth in *Railroad* v. *White*, 187 Fed. 556.

(*b*) EXPRESSIO UNIUS EST EXCLUSIO ALTERIUS.

The effect of the application of this maxim is to restrict the operation of a statute to the specific things enumerated.

Johnson v. *R. R.* 117 Fed. 462.

(*c*) Recent decisions of the United States Supreme Court.

In the *Second Employers' Liability Cases*, 223 U. S. at pages 49 and 50, Mr. Justice Van Devanter sets out the departures from the common law made by the Federal Act. With reference to assumption of risk he says:

> "The rule that an employer was deemed to assume the risk of injury, even if due to the employer's negligence, where the employee voluntarily entered or remained in the service with an actual or presumed knowledge of the conditions out of which the risk arose, is abrogated in all instances where the employer's violation of a statute enacted for the safety of his employees contributed to the injury."

The case principally relied upon in support of the position that assumption of risk arising from the master's negligence is not permissible as a defense to an action brought under the Federal Employers' Liability Act is *Wright* v. *Yazoo, etc. R. R. Co.* 197 Fed. p. 96, decided by the United States District Court for the Western District of Tennessee. This case was reviewed by the Circuit Court of Appeals for the Sixth District, 207 Fed. 281, and Circuit Judge Warrington holds that the question of assumed risk does not arise upon the evidence and, therefore, the rulings of the trial court concerning the limitations placed upon the doctrine by the Employers' Liability Act occasioned no prejudice, and the appellate court did not review such rulings. The Circuit Court of Appeals held that there was no evidence tending to show assumption of risk, and Judge Warrington uses this language: "The essential quality of consent on his part is lacking. The vital question is whether he knew or was chargeable with knowledge of the danger and voluntarily exposed himself to it" (p. 285).

State Courts in Construing the Federal Employers' Liability Act Have Held that Assumption of Risk is a Valid Defense Under the Act.

In *Barker* v. *Railway Co.*, 129 Pac. 1151, decided by the Supreme Court of Kansas, February 8, 1913, it is held that:

> "assumption of risk is a good defense under this act, except when the violation by the carrier of some statute enacted for the safety of employees has contributed to the injury or death of the employee, and when such defense is pleaded and supported by evidence, it is the duty of the court to instruct thereon."

After quoting section 4 of the Federal Employers' Liability Act, the court says:

> "The natural meaning of this language is that assumption of risk would be a defense when there was no violation by the common carrier of such statute. If contributory negligence and assumption of risk are not different, it is passing strange that Congress in its second enactment, should expressly declare in Section 3 that the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished, etc. That in all actions hereafter brought against any such common carrier by railroad under or by virtue of the provisions of this act to recover damages for personal injury to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: Provided, however, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common

carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

"That in any action brought against any common carrier under or by virtue of any of the provisions of this act, such employee shall not be held to have assumed the risk of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

"Such expressions are meaningless unless a clear distinction between contributory negligence and assumption of risk were recognized and intended. We should suppose that Congress meant that contributory negligence should never be a matter of defense, but should be provable in mitigation of damages in all cases save those in which the carrier had also contributed to the injury by violating some safety statute, and that assumption of risk should be a complete defense, except in case of such disregard of a safety requirement by the carrier. There is nothing to indicate an intention to hold the carrier liable ordinarily for an injury arising out of a risk assumed by the employee."

The Court of Civil Appeals of Texas held in *Freeman* v. *Powell*, 144 Southwestern Reporter, 1033, that assumption of risk is available as a defense, and after quoting section 4 of the act says:

"It thus appears that under the Federal statute a complaining employee to whom the act applies is not relieved from the operation of the ordinary rule of assumed risk, except in cases where there is a violation of some statute enacted for the safety of an employee, which has contributed to his injury or death."

In this case it was contended that a statute of the State of Texas abolishing assumption of risk was applicable to

an action to recover damages for injury to an employee engaged in interstate commerce. After quoting the provisions of the State statute with respect to assumption of risk, Connor, C. J., says:

> "In the respect just noted, the act of Congress conflicts with the State's statute which we have quoted. The power of Congress over interstate commerce is not an open question, and it extends to all agencies and instrumentalities by or through which it is carried on. As we have seen from the act of Congress quoted, Congress has undertaken to define the relative rights and liabilities of railway companies and their employees engaged in interstate commerce, and we do not think we have power to add to the Act of Congress by engrafting therein an exception to the consequences that must ordinarily flow from appellee's undisputed knowledge of the defect and negligence complained of in this suit.

An examination of the Texas statute will show that it excepts the employee from the charge of having assumed the risk "where a person of ordinary prudence would have continued in the service with the knowledge of the defect and danger, and in such case it shall not be necessary that the servant or employee give notice of the defect, as provided in subdivision 1 hereof." The trial court in our case placed this instruction upon the defense of assumption of risk in conformity with the decisions of the Supreme Court of North Carolina. The Texas case is, therefore, authority directly in point upon our position that the court's instruction is erroneous and places an incorrect construction upon the Federal Act.

The Supreme Court of Idado has held in *Neil* v. *Idaho & W. N. R. R.* 125 Pacific Reporter, 331, that under the Federal Act the defense of assumption of risk remains as at common law, unless the defendant has violated a statute enacted for the safety of employees.

To the same effect are the cases of *Bowers* v. *Southern Ry. Co.* 10 Georgia Appeals, 367; and *Hall* v. *Vandalia R. R. Co.* 169 Illinois Appeals, 12.

Assumption of risk as a defense to an action based upon this act is to be measured by the common law and its interpretation by the Supreme Court of the United States.

> "The liability of a railroad company to one of its employees is a question, not of local law, but of general jurisprudence upon which this court, in the absence of express statute regulating the subject, will exercise its own judgment, uncontrolled by the decisions of the courts of the several States."
>
> *Railway* v. *Prentice*, 147 U. S. 101.

A fortiori will the Supreme Court of the United States adopt its own interpretation of the common law defense of assumption of risk in determining the scope of a Federal statute.

The question of assumption of risk depends upon matters of general law and in its determination the Supreme Court of the United States is not required to follow the decisions of State courts.

Hough v. *R. R.* 100 U. S. 213.

At common law and under the decisions of Supreme Court of the United States a servant assumes the risk of defects arising from the master's negligence if he continues in the service with knowledge of such defects.

> "One understanding the condition of machinery and dangers arising therefrom, or who is capable of so doing, and voluntarily in the course of employment, exposes himself thereto, assumes the risk

thereof, and if injury results can not recover against the employer."

Butler v. *Frazee*, 211 U. S. 459;
Railroad v. *Harvey*, 228 U. S. 319.

"The doctrine applied in the older English cases and in all the American cases up to the present time, with a few possible unimportant exceptions, is that, in the case of all adult servants, except seamen, the actions must be declared not to be maintainable, as a matter of law, if the evidence leaves no reasonable doubt that the servant comprehended the abnormal risk which caused his injury."

Labatt on Master and Servant (1st ed.), p. 7.

"The doctrine that a servant who has no knowledge, actual or constructive, of an ordinary risk is not chargeable with its assumption, is implied in every jurisdiction in which the principles of the common law are recognized. The logical converse of this doctrine, viz: that a servant is to be regarded as having assumed extraordinary risk of which he had, or ought to have obtained, knowledge before his injury was received, was also applied universally until comparatively recent times, and is still the prevailing rule in the United States."

Labatt on Master and Servant (1st ed.), sec. 274.

In support of the above text the author cites the English cases and decisions of the Supreme Court of the United States and the Federal Circuit and District Courts and the courts of Alabama, Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Hampshire, New Jersey, (North Carolina does not appear), Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island,

Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia and Wisconsin.

See also Labatt (1st ed.), secs. 271, 174a, 276 and 280, and pp. 632, 633, 640, 641.

> "In all the English cases decided before the passage of the Employers' Liability Act, the courts proceeded upon the hypothesis that an assumption of an extraordinary risk was properly inferred, as a matter of law, from the mere fact that that servant accepted or continued in the employment with a knowledge of its existence and a full comprehension of the enhanced danger to which he was exposed.
>
> Labatt on Master and Servant (1st Edition), Sec. 280.

Judge Thompson in his work on Negligence (an authority radically favorable to the employee), says that if a servant, with knowledge of a defect in a machine which he is employed to operate, continues in the employment without objection or complaint, he is deemed to assume the risk of the danger; that this doctrine is so plain that it could hardly be made plainer by multiplying special statements and explanations. (Sections 4608, 4609.) "It is a part of this doctrine," Judge Thompson says in another section (4707), "that the servant assumes the risks of known defects in machinery, tools, appliances, etc., or of improper appliances furnished for the performance of a particular task, or where no proper appliances are furnished, although the defect or danger results from the negligence of the master, or from his violation of a statute, or a municipal ordinance."

In *Butler* v. *Frazee*, *supra*, the United States Supreme Court says:

> "The rule is too well settled to warrant an extensive discussion of it, or an attempt to analyze the

different reasons upon which it has been held to be justified."

Railroad v. *McDade*, 191 U. S. 64;
Railroad v. *Barrett*, 166 U. S. 617;
Norden v. *Gore Mechan Co.* (Conn.) 78 at 422;
Smalls v. *R. R.* 115 Ga. 137;
Katalla v. *Rones*, 186 Federal, 30.

To the same effect is *Brick Co.* v. *Miller*, 181 Fed. 830.

In *Detroit Crude Oil Co.* v. *Grable*, 94 Federal, 73, at page 76, the Circuit Court of Appeals of the Sixth Circuit, consisting of Taft and Lurton, circuit judges, and Clark, district judge, said:

> "And notwithstanding the general rule requiring the master to furnish a safe working place and safe instrumentalities, the servant, in addition to the ordinary perils incident to the business, assumes the risks arising from obvious defects in the things which he uses, and which are known or should be known to him."

Counsel for defendant in error states in his brief that the servant can not assume the risk of the negligence of the master, and he commits the very error of which we complain in assuming that the question of assumption of risk is to be determined by the rule adopted by the Supreme Court of North Carolina. Numerous decisions of that court are cited on pages 12 and 13 of the brief and it may be conceded that it is the settled doctrine in that State that an employee does not assume the risk of defective machinery due to the employer's negligence. This is the rule of the Supreme Court of North Carolina. Recent decisions of that court have so confused the defenses of assumption of risk and contributory negligence as to practically obliterate the distinction, and both defenses are now made to depend upon whether the employee did or did not exercise the care of a prudent

man, that is, assumption of risk has for all practical purposes been merged into contributory negligence. This is in direct conflict with the rule prevailing in the United States Supreme Court.

The quotation from *Union Pac. Ry. Co.* v. *O'Brien*, 161 U. S. 452, in the brief of the defendant in error, *omits the very essential exception to the rule stated, that if the defect, created by the negligence of the master, is known to the employee and he continues to use the defective appliance without objection, he assumes the risk of injury.* The common law rule and the exception are stated as follows in the very recent case of *Texas & Pac. Ry. Co.* v. *Harvey*, 228 U. S. 319:

> "At the common law a servant assumes the ordinary risk of his employment, but he is not obliged to pass upon the methods chosen by his employer in discharging the latter's duty to provide suitable appliances and a safe place to work, and he does not assume the risk of the employer's negligence in performing such duty. This rule is subject to the exception that, where a defect is known to the employee, or is so patent as to be readily observed by him, he can not continue to use the defective appliance, in the face of knowledge and without objection, without himself assuming the hazard incident to such a situation. If a defect is so plainly observable that the servant may be presumed to know its existence, and he continues in the master's employment without objection, he is said to have made his election to thus continue, notwithstanding the master's neglect, and in such a case he can not recover.
>
> "*Choctaw, O. & G. R. Co.* v. *McDade*, 191 U. S. 64;
>
> "*Schlemmer* v. *Buffalo, R. & P. R. Co.*, 220 U. S. 590, 596."

In *Texas & Pacific Railway Company* v. *Archibald*, 170

U. S. at pages 671 and 672, Mr. Justice White (now Chief Justice), says:

> "The elementary rule is that it is the duty of the employer to furnish appliances free from defects discoverable by the exercise of ordinary care and that the employee has a right to rely upon the duty being performed whilst in entering the employment he assumes the ordinary risks incident to the business, he does not assume the risk arising from the neglect of the employer to perform the positive duty owing to the employee with respect to appliances furnished.
>
> "An exception to this general rule is well established, which holds that where an employee receives for use a defective appliance and with knowledge of the defect continues to use it without notice to the employer he can not recover for an injury resulting from the defective appliance thus voluntarily and negligently used. * * * The employee is not compelled to pass judgment on the employer's methods of business or to conclude as to their adequacy. He has a right to assume that the employer will use reasonable care to make the appliances safe and to deal with those furnished relying on this fact, subject of course to the exception which we have already stated by which when an appliance is furnished an employee in which there exists a defect known to him, or plainly observable by him, he can not recover for an injury caused by such defective appliance if, with the knowledge above stated, he negligently continues to use it."

The very case relied upon by the Supreme Court of North Carolina to sustain the statement that a servant does not assume the risk arising from the master's negligence refers to the well established exception that the servant does assume the risk of injury resulting from the negligence of the master when the conditions brought

about by such negligence are known to the servant and the danger appreciated.

Railroad v. *McDade*, 191 U. S. 67.

In *Railway* v. *Shalstrom*, 195 Fed. 729, it is said:

> "Although the risk of the master's negligence and of its effect unknown to the servant is not one of the ordinary risks of the employment which he assumes, yet if the negligence of the master or its effect is known and appreciated by the servant, or is obvious, or 'so patent as to be readily observed by him by the reasonable use of his senses having in view his age, intelligence and experience,' and he enters and continues in the employment without objection, he elects to assume the risk of it, and he can not recover for the damages it causes."
>
> Citing *Railway* v. *Archibald*, *supra*.

A resumé of the authorities on the question of assumption of risk will be found in *St. Louis Cordage Company* v. *Miller*, 126 Federal Rep. 508, in which Judge Sanborn says:

> "The authorities and opinions to which reference has now been made have forced our minds irresistibly to the conclusion that the following rules of law have become irrevocably settled by the great weight of authority in this country and by the opinions of the Supreme Court, which upon well settled principles, must be permitted to control the opinions and actions of this court:
>
> "A servant by entering or continuing in the employment of a master assumes the risks and dangers of the employment which he knows and appreciates, and also those which an ordinarily prudent person of his capacity and intelligence would have known in his situation.
>
> "A servant who knows, or who by the exercise of reasonable prudence and care would have known, of the risks and dangers, which arose during his serv-

ice, but who continues in the employment without complaint, assumes those risks and dangers to the same extent that he undertakes to assume those existing when he enters upon the employment.

"Among the risks and dangers thus assumed are those which arise from the failure of the master to completely discharge his duty to exercise ordinary care to furnish the servant with a reasonably safe place to work and reasonably safe appliances and tools to use.

"Assumption of risk and contributory negligence are separate and distinct defenses. The one is based on contract, the other on tort. The former is not conditioned or limited by the existence of the latter, and is alike available whether the risk assumed is great or small and whether the danger from it is imminent and certain or remote and improbable.

"*The court below fell into an error when it instructed the jury that, although the plaintiff continued in the employment of the defendant by the side of the visible unguarded gearing with full knowledge that the cogs which injured her were uncovered, still she could not be held to have assumed the risk of working by their side unless the danger from them was so imminent that persons of ordinary prudence would have declined to incur it under similar circumstances.*" (Italics ours.)

The instruction condemned by Judge Sanborn is in the exact terms of the instructions given by the trial court in our case.

In *Kyner* v. *Mining Co.* 184 Fed. 43, Mr. Justice Van Devanter, who was then circuit judge, says:

"As respects the first specification of negligence, it conclusively appeared that the absence of the guard about the drum and lower cable was so patent as to be readily observed; that the enhanced danger arising therefrom was so obvious that its appreciation by the plaintiff was unavoidable in view of his years, intelligence and experience and that under

those conditions he voluntarily continued to work about the drum and cable. So even if the absence of the guard was a negligent omission on the part of the defendant, the court was bound to rule as a matter of law that the plaintiff assumed the risk."

Citing *Butler* v. *Frazee*, 211 U. S. 459.

It is useless to multiply authorities because the standard by which assumption of risk will be measured in construing the Federal Act is shown by the language of Mr. Justice Van Devanter in the *Mondou Case*, *supra*.

"The rule as to assumption of risk may be briefly expressed as follows: The servant assumes all the ordinary risks of the service, and all the extraordinary risks, i. e. *those due to the master's negligence*—of which he knows and the dangers of which he appreciates. Stated in this form the rule is followed, in the absence of statute, in all jurisdictions except in Missouri and North Carolina."

Labatt on Master and Servant (new edition), section 1186.

Requested Instructions on Issue of Assumption of Risk.

The court refused to instruct the jury as follows as requested by the defendant:

(1) "The court charges you that the Statute of North Carolina, Revisal Section 2646, abolishing assumption of risk as defense to an action brought against a railroad company by one of its employees, has no application in this case, and if you find that the plaintiff assumed the risk of injury from the explosion of the water glass, you will answer the second issue 'Yes.'"

Assignment of Error No. 11, Rec. p. 104.

We submit that this instruction is entirely correct and should have been given.

Railroad v. *Reid*, 222 U. S. 424;
Express Company v. *Croninger*, 226 U. S. 491.

(2) "The right of the plaintiff to recover damages in this action is to be determined by the provisions of the Federal Employers' Liability Act enacted by Congress at the session of 1908, and the court charges you that if you find by a preponderance of evidence that the water glass on the engine on which plaintiff was employed was not provided with a guard glass and the condition of the glass was open and obvious and was fully known to the plaintiff and he continued to use such water glass with such knowledge and without objection, and that he knew the risk incident thereto, then the court charges you that the plaintiff voluntarily assumed the risk incident to such use, and you will answer the second issue 'Yes.'"

The court gave this instruction as applicable to the issue of contributory negligence and instead of the words "then the court charges you that the plaintiff voluntarily assumed the risk incident to such use and you will answer the second issue 'Yes'" used the words "then the court charges you that the plaintiff was guilty of contributory negligence, and you will answer the third issue 'Yes.'"

To the refusal to give this instruction as requested and to the modification, defendant excepts.

Assignment of Error No. 12, Rec. p. 104.

The instruction, as requested, is in the exact language of the decisions of the United States Supreme court cited herein on the subject of assumption of risk, and the defendant was entitled to have it given without alteration.

Instead of instructing the jury as requested on the issue of assumption of risk, the trial court injected the question

of the prudence and care exercised by defendant in error into the instructions on this issue.

Assumption of Risk: Instructions Given Over Objection of Plaintiff in Error.

The court gave the following instructions on the issue of assumption of risk:

> "There has been no statute provided as applies to this glass water gauge which has been called to the attention of the court; so that leaves it open to the rights which the plaintiff might have under the law of this State, and the question of assumed risk, as has been argued by one, if not more, of counsel, grows out of the contractual relations between plaintiff and defendant."
>
> (p. 62, Rec.)

In this instruction the court gives expression to the view that the question of assumption of risk is to be determined by the laws of this State. We have presented authorities which, we submit, establish the law to be otherwise.

> "A man assumes the risk, when he takes employment, incident to the class of work which he has to perform."
>
> (p. 62, Rec.)

This instruction is designed to restrict assumption of risk by the employee to such risks as are incident to the employment, and disregards the risks created by the master's negligence of which the servant has notice. We have tried to show that this is not a correct statement of the law. Exception No. 52 is subject to the same criticism.

> "He does not assume the risk incident to the negligence of his employer in providing machinery and appliances with which he has to work."
>
> (Exception No. 53.)

This is clearly in conflict with the weight of authority in other States, and in conflict with the decisions of the United States Supreme Court cited herein. That the servant does assume such risks when known and appreciated is maintained by a long list of courts, and is disputed only by the courts of Missouri and North Carolina. This instruction was the logical result of the view that the question of assumption of risk must be determined by the law of the State of North Carolina.

> "On the other hand, the employer has the right to assume that his employee will go about the work in a reasonably safe way, and give due regard to the machinery and appliances which are in his hands and under his control; and if you should find from the evidence, by its greater weight, *because the burden in this instance is on the defendant*, that the plaintiff knew of the absence of the guard or shield to the water gauge and failed to give notice to the defendant or to the agent whose duty it was to furnish the water gauge and appliance, and he continued to use it without giving that notice, *it being furnished to him in a safe condition*, then he assumed the risk incident to his work in the engine with the glass water gauge in that condition, although he might have handled his engine in every other respect with perfect care."
>
> Assignment of error No. 6, pages 103–104, Rec.

We think the trial court is in error in placing upon the plaintiff in error the burden of showing that the defendant in error failed to give notice of the absence of the guard glass. That burden rested upon the plaintiff.

Again, this instruction makes the question of assumption of risk rest upon the position that the water gauge was furnished in a safe condition. It ignores the evidence that the glass was defective when plaintiff got on the engine.

"Theory that the mere fact of the servant's having continued to work with knowledge of an abnormal risk charges him, as a matter of law, with an assumption of risk, manifestly involves the corollary that, viewed as an evidential element, the servant's failure to express dissatisfaction with his environment is merely corroborative and confirmatory in its effect."

Labatt (New Edition), Section 1202.

"The fact that the dangerous conditions arose after the plaintiff entered the employment is considered to be immaterial, where it is shown that he had continued to work after the change with a full appreciation of the increased risk."

Labatt on Master and Servant (New Edition, Sec. 1195).

"It has never been questioned, and there are numerous cases expressly or impliedly deciding that the doctrine of assumption of risk is a bar to the action whenever the abnormal danger was known actually or constructively, to the servant at the time when he entered the employment."

Labatt on Master & Servant (New Edition), Section 1195;

Leary v. *Boston & A. R. Co.* 139 Mass. 580;

Ragan v. *Railway Co.* 97 Mich. 265.

The trial court instructed the jury:

"But if you find that he gave notice to the foreman of the round-house, and if you should find that the use of the water gauge was not so obviously dangerous that a reasonably prudent man, careful of himself not to get hurt while he was about his work, and went on and used it, *he would not assume the risk;* but if the danger was so apparent that a reasonably prudent man, careful of himself not to receive injury, would see that he was in imminent danger and would observe by the use of it that he was endangering himself by going on and working

with it, that there was greater danger of getting hurt than otherwise, and he continued to work with it, he would be assuming the risk and responsibility, and it would be your duty to answer that issue 'Yes.'"

Assignment of Error No. 5, p. 103, Rec.

In this instruction the trial court applied the rule as laid down by the Supreme Court of North Carolina making the question of assumption of risk depend upon the rule of the prudent man.

Assumption of Risk and Contributory Negligence Are Distinct Defenses.

An attempt is made to meet our position that plaintiff assumed the risk of injury by characterizing his conduct as contributory negligence. It is hoped, in that way, to justify submitting to the jury the question of measuring the relative negligence of the defendant and plaintiff under section 3 of the Employers' Liability Act. In order to reach that result it is necessary to confuse the defense of assumption of risk and contributory negligence which the Supreme Court of the United States, the text writers and the great weight of authority hold to be distinct. An examination of Labatt on Master and Servant will show that the writer of that standard book is severely caustic in his criticism of the courts whose decisions confuse assumption of risk and contributory negligence.

"The question of assumption of risk is quite apart from that of contributory negligence."

Railroad v. *McDade*, 191 U. S. 64.

Schlemmer v. *Railroad*, 220 U. S. 590.

That "assumption of risk is not modified nor controlled by the fact that contributory negligence is no defense, is clearly the settled rule."

Jackson v. *Chicago, R. I. & P. Ry. Co.* 178 Fed. at p. 435.

"The two defenses being distinct, it follows that evidence of the servant's having begun or continued work with a knowledge of the danger arising from the master's breach of duty raises both the questions whether he assumed that danger and whether he was negligent. *If for any reason it appears that the master is precluded from availing himself of one of these defenses, the servant's action may still be resisted on the ground that the other is applicable.*

Labatt on Master and Servant (1st Edition), page 749.

"It would seem that in view of the contractual relations of the parties, the first question which, in a natural, logical sequence, demands settlement, is whether the risk which caused the injury was one of those accepted under an implied agreement, and the question whether the servant's conduct was imprudent only becomes material after the conventional assumption of the risk has been negatived. In a good many cases we find the essentially secondary and ulterior character of the second question fully recognized. Thus, courts have refused to consider the defense of assumption of risk where the evidence showed that the risk was assumed as being ordinary, or for the reason that, although it was extraordinary, the servant went on working with a full comprehension of its nature and extent."

Labatt (1st Edition), sec. 307.

"A still more serious error," says Mr. Labatt, at page 767, "is the partial or complete obliteration of the boundary line between the defenses themselves. The mildest form of this logical heresy is the view that, although there may be a distinction between the two defenses, it often becomes too subtle to be of any practical importance, or that it is not of much practical value."

See note 768 for criticism of *Rittenhouse* v. *Railroad*, 120 N. C. 544.

"Few courts, if any, are irrevocably and unreservedly committed to the doctrine that, where the master has been guilty of a breach of duty the servant can be debarred from recovery *only* by his own negligence; and it can scarcely be supposed that the peculiar theories which prevail in North Carolina as to the absence of any necessity for differentiating the defenses in instructions to a jury will ever find acceptance in other States."

Labatt (1st Edition), page 772. See also page 747.

We submit that the following instructions show that the court confused the two defenses of assumption of risk and contributory negligence.

"That is governed largely by the same rules as applied to the question of assumption of risk. Did he continue to use the glass gauge when it was obviously dangerous that a reasonably prudent man careful of himself would not do it? Was the danger so apparent that a reasonably prudent man would cease to use that and use the other gauge? If so, it would be your duty to answer the third issue 'Yes.'"

(Exception No. 50, p. 62 Rec.)

"But if the danger was not so obvious that a reasonably prudent man, careful of himself, would not realize the danger of using the water glass, and he continued to use it, he would not be guilty of contributory negligence."

(Exception No. 60, p. 64 Rec.)

"If you find by the preponderance of the evidence that the water glass by which plaintiff was injured was not provided with a guard glass and the condition of the water glass was open and obvious and was fully known to the plaintiff, and he continued to use such water glass with such knowledge and without objecting, and knew the risk incident

thereto, then the court charges you that the plaintiff was guilty of contributory negligence, and you should answer the third issue 'Yes.'"

(Exception No. 66, p. 66 Rec.)

PLAINTIFF IN ERROR REQUESTED THE COURT TO INSTRUCT THE JURY THAT IF THEY BELIEVED THE EVIDENCE THE PLAINTIFF (DEFENDANT IN ERROR) ASSUMED THE RISK OF INJURY FROM THE EXPLOSION OF THE WATER GLASS—(ASSIGNMENT OF ERROR NO. 10, PRINTED RECORD, PAGE 104).

The trial court refused this instruction, and such refusal was approved by the Supreme Court of North Carolina.

Labatt on Master and Servant, says:

"An analysis of the decisions involving the effect of a promise shows that the servant is deemed to have no cause of action unless he proves the following facts:

"(1) That a promise was given, either to the effect that the dangerous condition which caused the injury would not be permitted to come into existence, or that such conditions would be remedied.

"(2) That the promise was given either by the master himself or by some agent authorized to make it in his behalf.

"(3) That the servant's reliance upon the promise was the inducing motive for his consenting to subject himself to the given risk.

"If these facts are satisfactorily proved, the master may still escape liability by establishing one or the other of the following propositions:

"(1) That the servant was chargeable, in spite of the promise, with an assumption of the given risk.

"(2) That the servant was chargeable, in spite of the promise, with contributory negligence in having undertaken, or in having continued to perform the work in question.

"(3) That in view of his knowledge of the risk to

which the promise related, the servant did not exercise proper care in performing the duties which he undertook or continued to perform after the promise was given."

Labatt on Master & Servant (New Edition), Section 1342.

And in section 419 (1st edition), Mr. Labatt says:

"As there must have been something amounting to a promise by the master, it follows that a simple protest or complaint by the servant, not followed by an assurance that the defect will be remedied, will not cast the responsibility upon the master."

"In order to bring his case within the doctrine of a promise to repair, the authorities are quite numerous to the effect that the promise must have been the inducing motive which kept the servant at work, and without which he would have quit; otherwise it is not binding."

Coin v. *Lounge Co.* 222 Mo. 1179;
Dresser's Employers' Liability, sec. 115;
R. R. v. *Norman*, 49 Ohio St. 598.

"In order to enable the servant to recover, he must show: (1) that he received from the master's representative some assurance the effect of which was that the condition under which he was working would be so altered that the particular danger from which he apprehended injury would cease to exist; and (2) that his reliance on that assurance was the efficient cause of his remaining in the employment."

40 L. R. A., 793; note by the author of Labatt on Master and Servant, citing a great number of authorities.

The evidence offered by defendant falls far short of showing that he continued in the employment of defendant in reliance upon a promise to repair. On the

other hand his evidence indicates that he did not place reliance in such promise, but started at once to secure for himself a guard glass and made an effort to have one cut at the Baker & Thompson Lumber Company.

(p. 13, Printed Rec.)

Again, we submit that the evidence fails to establish the fact that defendant in error reported the defect. The Seaboard Air Line Railway has established a reasonable rule for reporting defects and securing repairs, that is, by work reports, which were required to be filed and were distributed among the workmen. These work reports contained a provision, which was binding upon its employees, to the effect that:

> "Enginemen must carefully inspect their engines after each trip and report their condition on this form. They will be held responsible for defects not reported. No attention will be given verbal reports or reports not signed by enginemen.

Defendant in error testified that he operated this engine on three round-trips with the water glass in a defective condition and upon his return to Raleigh on each trip he made a report in writing of the defects on his engine. These work reports appear on pages 49 to 52 of the Printed Record. In none of them is reference made to the absence of the guard glass.

Defendant in error testified:

> "After I got back from a trip it was my duty to make out reports and put them in a box at the round house. These reports were for work that I reported to be done on the engine. My duty as an engineer required me to put on the work report such things as I thought necessary to be done on my engine."

In defendant in error's statement to the superintend-

ent of plaintiff in error (Printed Record, page 53) will be found this significant admission:

> "Q. According to your statement this fixture was not equipped with guard glass when you made the first trip on engine July 28th. According to register, you made three trips on this engine since July 28th. Had you made any report as to this fixture not being equipped with guard glass?
> "A. No, sir.
> "Q. Why?
> "A. Overlooked reporting guard glass in water shield for causes best known to myself."

The Motion of Plaintiff in Error for Judgment *Non Obstante Veredicto* Should Have Been Sustained.

We submit that the uncontradicted evidence in this case established the fact that defendant in error assumed the risk of injury from the explosion of the water glass.

There is no allegation in the complaint that Horton reported the defective condition of the water glass and received a promise to repair. On the face of the complaint, he continued to work in the presence of a known danger without objection. It is true he testified that he reported the defect and was told that the company did not keep them in stock at Raleigh, and the day round-house foreman at Raleigh told him to run the engine "like she was," and he would send to Portsmouth and get a guard glass, but this testimony was admitted over objection and exception by the plaintiff in error. (Printed Record, page 12; Assignment of Error, No. 8, Printed Record, page 104.) In the absence of allegation, this testimony was incompetent. A recovery must be had *secundum allegata et probata*, and proofs without allegations are as unavailing as allegations without proofs.

McCoy v. *R. R.* 142 N. C. 383;
Moss v. *R. R.* 122 N. C. 971.

In *Malm* v. *Thelin*, 47 Nebraska, 686, the Supreme Court of Nebraska says:

> "The presumption is that a servant employing machinery obviously defective has assumed the risk occasioned by the use of such machinery, and in order to recover he must rebut that presumption, and in order to rebut it, he must not only prove but he must plead the facts which create the exception—as, for instance, that on complaint to the master a promise was made to remove the defect and the machinery was used relying upon the promise."

The allegation of the complaint is that "the defendant furnished plaintiff a locomotive engine, negligently and carelessly equipped with a water glaes that was not modern in its make and that was of an inferior grade and quality, and which water glass was known to the defendant to be not modern in its make and unsafe for use and of an inferior grade and quality and liable to burst and seriously and permanently injure the plaintiff while in the discharge of his duty as locomotive engineer;" that while he was performing his duties as engineer and while looking at the said water glass on the 4th day of August, 1910, the water glass exploded and injured his eye.

This allegation shows that defendant in error continued to work in the face of a known danger, but it lacks an averment that he reported the defect and received a promise to repair.

> "A servant must either aver his want of knowledge of the defect which caused his injury, or that having such knowledge he informed the master and continued in the employment upon a promise express or implied, to remedy the defect."
> *Railroad* v. *Norman*, 49 Ohio State, 598.

> "In an action for negligence brought by a servant against his master for personal injury resulting from

> the unsafe state of the premises upon which the servant was employed, the statement of claim must allege not only that the master knew, but that the servant was ignorant of the danger."
>
> *Griffith* v. *Docks Co.* 13 Q. B. Div. 259.

Upon the fact of the complaint, it appeared that defendant in error assumed the risk of injury, which entitled the plaintiff in error to judgment upon the pleadings.

Motion to Place on Summary Docket.

The questions here involved are of the greatest importance to carriers whose rights are fixed by this statute and justify consideration by this court on oral argument not admitted of in the limited time allowed for such argument on the summary docket.

Conclusion.

While it is true that this case has been tried twice in the Superior Court of Wake County and argued twice in the Supreme Court, as stated in brief of defendant in error, we submit that it has not yet been tried in accordance with a correct construction of the Federal Act to which plaintiff in error is entitled.

On the first trial Horton was non-suited because the evidence disclosed that he assumed the risk. On appeal, the Supreme Court of North Carolina, recognizing no distinction between contributory negligence and assumption of risk, sent the case back for another trial upon the ground that contributory negligence is a question for the jury. Chief Justice Clark, writing the opinion of the court, omits all reference to assumption of risk, and fails even to quote section 4 of the Federal Act on which the defendant relied. See opinion, 157 N. C. 146. The

plaintiff in error could not sue out a writ of error to this court at that time because as to it the judgment was not final. The case was tried again in the lower court and a judgment rendered for $7,500, which is now before this court for review.

Finally, we refer the court to the very exhaustive and able opinion of Mr. Justice Brown, of the Supreme Court of North Carolina, in dissenting from the majority opinion. It seems to us to establish not only the right of the plaintiff in error to have the judgment reviewed by this court, but a right to the reversal of that judgment.

HILARY A. HERBERT,
BENJAMIN MICOU,
RICHARD P. WHITELEY,
MURRAY ALLEN,
Counsel for Plaintiff in Error.

SEABOARD AIR LINE RAILWAY *v.* HORTON.

ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

No. 691. Argued February 27, 1914.—Decided April 27, 1914.

A writ of error in terms returnable within thirty days from the date thereof substantially complies with the return day provision in clause 5 of Rule 8 of this court.

Where the state court of last resort sustained the trial court in overruling contentions made by the plaintiff in error, asserting a construction of the Employers' Liability Act which if acceded to would have resulted in a verdict in his favor, this court has jurisdiction under § 237, Judicial Code.

Since Congress, by the Employers' Liability Act of 1908, took control of the liability of carriers engaged in interstate transportation by rail to employés injured while engaged in interstate commerce, all state laws upon the subject have been superseded. *Second Employers' Liability Cases*, 223 U. S. 1, 55.

Whatever may have been the common law rule theretofore, Congress, in enacting the Employers' Liability Act, intended to, and did, base the action on negligence only and excluded responsibility of the carrier to its employés for defects and insufficiencies not attributable to negligence.

The provision diminishing liability of the carrier in case of contributory negligence on the part of the injured employé except where there has been a violation by the carrier of any statute enacted for the safety of employés, relates to Federal statutes only and not to state statutes.

The Employers' Liability Act having expressly eliminated the defense of assumption of risk in certain specified cases, the intent of Congress is plain that in all other cases such assumption shall have its former effect as a bar to an action by the injured employé.

When the employé knows of a defect in the appliances used by him and appreciates the resulting danger and continues in the employment without objection, or without obtaining from the employer an assurance of reparation, he assumes the risk even though it may arise from the employer's breach of duty.

Where there is promise of reparation by the employer, the continuing on duty by the employé does not amount to assumption of risk unless the danger be so imminent that no ordinarily prudent man would rely on such promise.

Under the Employers' Liability Act a defect in an appliance which is not covered by any of the Federal Safety Acts does not leave the employer absolutely responsible for the defect, but the common law rule as to assumption of risk applies; and so *held* as to a defect in a water gauge of which the engineer had knowledge before the accident resulting therefrom.

162 No. Car. 77, reversed.

THE facts, which involve the construction of the Federal Employers' Liability Acts of 1908 and 1910, and the effect of those statutes on state laws in regard to liability of employers, are stated in the opinion.

Mr. Benjamin Micou and *Mr. Murray Allen*, with whom *Mr. Hilary A. Herbert* and *Mr. Richard P. Whiteley* were on the brief, for plaintiff in error.

Mr. William C. Douglass and *Mr. Clyde A. Douglass* for defendant in error:

There is no Federal question. Plaintiff in error has been denied no right, privilege, or immunity under the Employers' Liability Act and this court has no jurisdiction.

Plaintiff in error did not specifically claim, nor was it denied, any right, privilege, or immunity under the Employers' Liability Act.

Assumption of risk is a common-law defense and not a creation of the Federal power.

Plaintiff in error elected to have the question of defendant in error's continuing to work in the face of a known danger, tried under both the issue of contributory negligence and assumption of risk.

The record in this case shows clearly that the writ of error was taken for delay only, and that the questions on which the decision depends are so frivolous as not to need further argument, and that the case is of such a character as not to justify extended argument.

The servant cannot assume the risk of the negligence of the master.

This case was properly submitted to the jury upon the doctrine of the ideal prudent man.

In support of these contentions, see *Avandano* v. *Gay*, 8 Wall. 377; *Barber Asphalt Co.* v. *Austin*, 186 Fed. Rep. 443; *Burnett* v. *Atlantic Coast Line*, 79 S. E. Rep. 414; *Bissell* v. *Lumber Co.*, 152 Nor. Car. 124; *Bridgers* v. *St. Louis R. R. Co.*, 6 Mo. App. 389; *Craig* v. *Chicago R. R. Co.*, 91 Michigan, 634; *Consolidated &c. Co.* v. *Heanni*, 35 N. E. Rep. 162; *Deninger* v. *Am. Locomotive Co.*, 185 Fed. Rep. 32; *Fosburg* v. *Railroad Co.*, 94 N. Y. 374; *Gotlich* v. *Railroad Co.*, 100 N. Y. 467; *Green* v. *Minn. & St. L. R. P Co.*, 39 Minnesota, 248; *Gardner* v. *Railroad Co.*, 150 U. . 349; *Hicks* v. *Manufacturing Co.*, 138 Nor. Car. 319; *Hudson* v. *Railroad Co.*, 104 Nor. Car. 491; *Hemarick* v. *Railway Co.*, 186 Fed. Rep. 142; *Kane* v. *Nor. Cent. R. R. Co.*, 112 U. S. 91; *Lake Shore R. R. Co.* v. *McCormick*, 79 Indiana, 440; *Leggett* v. *Railroad Co.*, 152 Nor. Car. 111; *Mann* v. *Railroad Co.*, 111 Nor. Car. 482; *Marks* v. *Cotton Mills*, 138 Nor. Car. 402; *Murdock* v. *Memphis*, 20 Wall. 590; *N. Y. Elev. R. R. Co.* v. *Fifth Natl. Bank*, 135 U. S. 432; *Perkins* v. *Sq. Car. R. R. Co.*, 48 So. Car. 364; *Penna. R. R. Co.* v. *Hughes*, 191 U. S. 478; *Pressly* v. *Yarn Mills*, 138 Nor. Car. 417; *Schlacher* v. *Ashland Iron Co.*, 89 Michigan, 262; *Sims* v. *Lindsay*, 122 Nor. Car. 678; *Sibbert* v. *Cotton Mills*, 145 Nor. Car. 211; *So. Pac. Co.* v. *Yeargan*, 109 Fed. Rep. 441; *Snow* v. *Railroad*, 8 Allen, 441; 1 Shear. & Redf. on Neg., § 194; *Tanner* v. *Lumber Co.*, 140 Nor. Car. 477; *Un. Pac. R. R. Co.* v. *O'Brien*, 161 U. S. 452; *Worley* v. *Laurel River Co.*, 73 S. E. Rep. 107; 1 White on Personal Injuries, §§ 370, 377; *Wright* v. *Yazoo &c. R. R. Co.*, 197 Fed. Rep. 96.

The charge should be considered as a whole. The refusal to grant special requests to charge is not error, when their substance is embraced in the instructions actually given. *Northern Pac. Ry. Co.* v. *Urlin*, 158 U. S. 271; *Railroad Co.* v. *Leak*, 163 U. S. 280; *Laber* v. *Cooper*, 7

Wall. 565; *Mining Co.* v. *Cheeseman*, 116 U. S. 529; *Insurance Co.* v. *Ursur*, 144 U. S. 439; *Ayers* v. *Watson*, 113 U. S. 594.

MR. JUSTICE PITNEY delivered the opinion of the court.

Horton sued the Seaboard Air Line Railway in the Superior Court of Wake County, North Carolina, to recover damages for personal injuries sustained by him while in defendant's employ as a locomotive engineer. The action was brought under the Federal Employers' Liability Act of April 22, 1908, c. 149, 35 Stat. 65, as amended April 5, 1910, c. 143, 36 Stat. 291. In the complaint it was sufficiently averred that defendant was a corporation operating a line of railway as a common carrier in interstate commerce, and that plaintiff at the time he was injured was employed by defendant in such commerce. These facts were not in issue at the trial.

As to the circumstances of the occurrence of the injury, plaintiff's evidence tended to show that on July 27, 1910, defendant's locomotive engine No. 752 was placed in his charge; that it was equipped with a Buckner water gauge, a device attached to the boiler head for the purpose of showing the level of the water in the boiler, and consisting of a brass frame or case inclosing a thin glass tube which communicated with the boiler above and below, in such manner that the tube received water and steam direct from the boiler and under the full boiler pressure. In order to shield the engineer from injury in case of the bursting of the tube, a piece of ordinary glass, 2 or 3 inches wide, 8 or 9 inches long, and about half an inch thick, known as a guard glass, should have been provided, this being a part of the regular equipment of the Buckner water gauge. There were slots for receiving the guard glass and holding it in position in front of the water tube. At each end of the tube, valves were provided for the purpose of disconnect-

ing it from the boiler. As an alternative but probably less convenient method of determining the level of the water in the boiler, ordinary gauge cocks were provided.

Plaintiff was an experienced locomotive engineer, and, according to his own testimony, was fully aware of the function of the guard glass and of its importance to his safety. He testified that when he took the engine out on his first trip on July 27, he observed that the guard glass was missing; that on his return upon the following day he reported this to defendant's round-house foreman, to whom reports of such defects were properly made, and asked him for a guard glass; that the foreman stated there were none in stock at that place, and it would be necessary to send to a distance to get one; that he would do this, and that plaintiff should meanwhile run the engine without one; and that, having ineffectually endeavored to get a guard glass from another source, plaintiff proceeded to drive the engine with the use of the unguarded water gauge until August 4, when the glass exploded and flying fragments struck him in the face, causing the injuries upon which his claim for damages was based.

Defendant's evidence tended to show that when the engine was placed in plaintiff's charge on July 27 the water glass was in good condition, with a guard glass in place; that the gauge cocks were likewise in good working order; that it was the duty of a locomotive engineer to inspect his engine and know that it was in proper order before taking it out, and if not in proper order to make a written report to the round-house foreman specifying the defects; that if anything should happen to the water glass it was the engineer's duty to close the valves so as to exclude the steam pressure from it, and run the engine with the gauge cocks, and that these were sufficient for the purpose; and that plaintiff made repeated reports in writing between July 27 and the time of his injury mentioning other things needed about his engine, but making no mention of the

water gauge or the guard glass. The fireman testified specifically that when plaintiff took charge of the engine on the morning of the 27th the water glass had the shield or guard in front of it, but that it was smoky, so that one could not see through it; that he, the fireman, in the presence of plaintiff, removed the guard glass in order to clean it; and that in plaintiff's presence it became broken. The round-house foreman specifically denied plaintiff's testimony about the complaint and the promise of reparation.

Under instructions presently to be noticed, the case was submitted to the jury upon three issues, to which responses were made as follows:

(1) Was the plaintiff injured by defendant's negligence? Answer, Yes.

(2) If so, did plaintiff assume the risk of injury? Answer, No.

(3) Did plaintiff by his own negligence contribute to his injury? Answer, Yes.

The jury also assessed substantial damages, for which judgment was rendered by the trial court, and upon appeal the Supreme Court affirmed the judgment, 162 Nor. Car. 424. The case comes here, under § 237, Judicial Code, upon questions arising out of instructions given and refused to be given to the jury as to the nature of the duty of the employer and the rules respecting assumption of risk and contributory negligence under the Federal Employers' Liability Act.

There is a motion to dismiss, upon the ground that no return day is specified in the writ of error or citation. *Carroll* v. *Dorsey* (1857), 20 How. 204, 207, and *Sea* v. *Connecticut Mutual Life Ins. Co.* (1880), 154 U. S. 659, are relied upon. These decisions were based upon § 22 of the Judiciary Act of September 24, 1789, c. 20, 1 Stat. 73, 84, which was held to require a certain return day to be specified in the writ of error. Accordingly, General Rule

33, promulgated December Term, 1867 (6 Wall. vi), afterwards found as Clause 5 of Rule 8 of the revised rules promulgated January 7, 1884 (108 U. S. 577), required that the writ of error and citation should be returnable on the first day of the term in cases where final judgment was rendered more than thirty days before that day, and on the third Monday of the term in cases where judgment was rendered less than thirty days before the first day. Blatch. U. S. Ct. Rules 77. But under the authority conferred by Rev. Stat., § 917, the court, on January 26, 1891, amended Clause 5 of Rule 8 so as to read: "All appeals, writs of error, and citations must be made returnable not exceeding thirty days from the day of signing the citation, whether the return day fall in vacation or in term time, and be served before the return day," (137 U. S. 710). And in the present Rule as promulgated December 22, 1911 (222 U. S., Appendix, p. 14), the same language is retained, with an exception extending the time to sixty days in writs of error and appeals from the western States, and Alaska, Hawaii and Porto Rico, and to one hundred and twenty days as to the Philippine Islands. An extension of the time in favor of the more distant States and Territories was first introduced as Clause 3 of Original Rule 63, promulgated at December Term, 1853 (16 How. ix), and has been continued, with amendments, until the present time (21 How. viii; 2 Wall. viii; 108 U. S. 578). It has, however, no bearing upon the form of the writ or citation, aside from the limit of time that may be allowed between date and return.

The present writ of error and citation were dated the fourth day of August, 1913, and in terms were returnable "within thirty days from the date hereof." This form has been usually employed, with the approval of the court, since the amendment of the rule made in 1891, as mentioned. It is a substantial compliance with the present

rule, and tends to avoid errors that otherwise might be made in inserting a day certain as a return day.

This motion must therefore be denied.

A second motion to dismiss, based upon grounds still more technical, and which need not be particularly stated, will likewise be denied.

There is a further motion to dismiss for want of jurisdiction, upon the ground that no right, privilege, or immunity under the Employers' Liability Act was especially set up or claimed in the state court of last resort and by that court denied. But since that court sustained the trial court in overruling certain contentions made by plaintiff in error asserting a construction of the act which, if acceded to, would presumably have produced a verdict in its favor, and consequent immunity from the action, this motion must be denied, upon the authority of *St. Louis, Iron Mountain & Southern Ry.* v. *McWhirter*, 229 U. S. 265.

Coming now to the merits, we need consider only certain assignments of error that are based upon exceptions to the action of the trial judge in giving and refusing to give instructions relating to the issues of defendant's negligence, the assumption of risk, and contributory negligence.

At the outset we observe that the judge evidently misapprehended the effect of the Federal act upon state legislation. Thus, the jury was told that plaintiff had brought the action under the Federal statute; "And where Congress enacts a law, within the limits of its power, that law should be enforced uniformly throughout the entire United States. If it is in conflict with the state law, the state law is superseded, but where there is no conflict expressed by the statute of the United States, then the rule of the State prevails." This, of course, in the absence of a specific statement of the applicable rule of the state law, might be treated as academic. But the theory

was carried into the specific instructions, to the extent that upon the questions of the employer's duty and the assumption of risk by the employé, the charge was modeled rather upon the North Carolina statute than upon the act of Congress. By § 2646, Nor. Car. Revisal of 1905, "Any servant or employé of any railroad company operating in this State who shall suffer injury to his person, or the personal representative of any such servant or employé who shall have suffered death in the course of his services or employment with such company by the negligence, carelessness or incompetence of any other servant, employé or agent of the company, or by any defect in the machinery, ways or appliances of the company, shall be entitled to maintain an action against such company. Any contract or agreement, expressed or implied, made by any employé of such company to waive the benefit of this section shall be null and void."

Upon the issue of defendant's negligence, the trial court charged the jury as follows: "It is the duty of the defendant to provide a reasonably safe place for the plaintiff to work, and to furnish him with reasonably safe appliances with which to do his work." And in various other forms the notion was expressed that the duty of defendant was absolute with respect to the safety of the place or work and of the appliances for the work. Thus: "If you find from the evidence that it [the locomotive engine] was turned over to him without the guard, and if you further find from the evidence that the guard was a proper safety provision for the use of that gauge, and that it was unsafe without it, then the defendant did not furnish him a safe place and a safe appliance to do his work, and if it remained in that condition it was continuing negligence on the part of the defendant, and if he was injured in consequence thereof, if you so find by the greater weight of the evidence, you should answer the first issue 'Yes.'"

In these instructions the trial judge evidently adopted the same measure of responsibility respecting the character and safe condition of the place of work, and the appliances for the doing of the work, that is prescribed by the local statute. But it is settled that since Congress, by the act of 1908, took possession of the field of the employer's liability to employés in interstate transportation by rail, all state laws upon the subject are superseded. *Second Employers' Liability Cases*, 223 U. S. 1, 55.

The Act is quoted in full in that case at p. 6. By its first section a right of action is conferred (under conditions specified) for injury or death of the employé "resulting in whole or in part from the negligence of any of the officers, agents, or employés of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

This clause has two branches: the one covering the negligence of any of the officers, agents, or employés of the carrier, which has the effect of abolishing in this class of cases the common law rule that exempted the employer from responsibility for the negligence of a fellow employé of the plaintiff; and the other relating to defects and insufficiencies in the cars, engines, appliances, etc. But, plainly, with respect to the latter as well as the former ground of liability, it was the intention of Congress to base the action upon negligence only, and to exclude responsibility of the carrier to its employés for defects and insufficiencies not attributable to negligence. The common law rule is that an employer is not a guarantor of the safety of the place of work or of the machinery and appliances of the work; the extent of its duty to its employés is to see that ordinary care and prudence are exercised, to the end that the place in which the work is to be performed and the tools and appliances of the work

may be safe for the workmen. *Hough* v. *Railway Co.*, 100 U. S. 213, 217; *Washington & Georgetown Railroad Co.* v. *McDade*, 135 U. S. 554, 570; *Choctaw, Oklahoma & Gulf R. R. Co.* v. *McDade*, 191 U. S. 64, 67. To hold that under the statute the railroad company is liable for the injury or death of an employé resulting from any defect or insufficiency in its cars, engines, appliances, etc., however caused, is to take from the act the words "due to its negligence." The plain effect of these words is to condition the liability upon negligence; and had there been doubt before as to the common law rule, certainly the Act now limits the responsibility of the company as indicated. The instructions above quoted imposed upon the employer an absolute responsibility for the safe condition of the appliances of the work, instead of limiting the responsibility to the exercise of reasonable care. In effect, the jury was instructed that the absence of the guard glass was conclusive evidence of defendant's negligence. In this there was error.

The questions more particularly discussed, however, and upon which the decision seems to have turned in the Supreme Court of North Carolina, pertain to the issues of assumption of risk and contributory negligence. By § 3 of the act of 1908 it is declared that "The fact that the employé may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employé: *Provided*, that no such employé who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employés contributed to the injury or death of such employé." And by § 4, "Such employé shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for

the safety of employés contributed to the injury or death of such employé."

By the phrase "any statute enacted for the safety of employés," Congress evidently intended Federal statutes, such as the Safety Appliance Acts, (March 2, 1893, c. 196, 27 Stat. 531; March 2, 1903, c. 976, 32 Stat. 943; April 14, 1910, c. 160, 36 Stat. 298; February 17, 1911, c. 103, 36 Stat. 913); and the Hours of Service Act (February 4, 1907, c. 2939, 34 Stat. 1415). For it is not to be conceived that, in enacting a general law for establishing and enforcing the responsibility of common carriers by railroad to their employés in interstate commerce, Congress intended to permit the legislatures of the several States to determine the effect of contributory negligence and assumption of risk, by enacting statutes for the safety of employés, since this would in effect relegate to state control two of the essential factors that determine the responsibility of the employer.

It seems to us that § 4, in eliminating the defense of assumption of risk in the cases indicated, quite plainly evidences the legislative intent that in all other cases such assumption shall have its former effect as a complete bar to the action. And, taking §§ 3 and 4 together, there is no doubt that Congress recognized the distinction between contributory negligence and assumption of risk; for, while it is declared that neither of these shall avail the carrier in cases where the violation of a statute has contributed to the injury or death of the employé, there is, with respect to cases not in this category, a limitation upon the effect that is to be given to contributory negligence, while no corresponding limitation is imposed upon the defense of assumption of risk—perhaps none was deemed feasible.

The distinction, although simple, is sometimes overlooked. Contributory negligence involves the notion of some fault or breach of duty on the part of the employé, and since it is ordinarily his duty to take some precaution

for his own safety when engaged in a hazardous occupation, contributory negligence is sometimes defined as a failure to use such care for his safety as ordinarily prudent employés in similar circumstances would use. On the other hand, the assumption of risk, even though the risk be obvious, may be free from any suggestion of fault or negligence on the part of the employé. The risks may be present, notwithstanding the exercise of all reasonable care on his part. Some employments are necessarily fraught with danger to the workman—danger that must be and is confronted in the line of his duty. Such dangers as are normally and necessarily incident to the occupation are presumably taken into the account in fixing the rate of wages. And a workman of mature years is taken to assume risks of this sort, whether he is actually aware of them or not. But risks of another sort, not naturally incident to the occupation, may arise out of the failure of the employer to exercise due care with respect to providing a safe place of work and suitable and safe appliances for the work. These the employé is not treated as assuming until he becomes aware of the defect or disrepair and of the risk arising from it, unless defect and risk alike are so obvious that an ordinarily prudent person under the circumstances would have observed and appreciated them. These distinctions have been recognized and applied in numerous decisions of this court. *Choctaw, Oklahoma & Gulf R. Co.* v. *McDade*, 191 U. S. 64, 68; *Schlemmer* v. *Buffalo, Rochester & Pittsburgh Ry. Co.*, 220 U. S. 590, 596; *Tex. & Pac. Ry. Co.* v. *Harvey*, 228 U. S. 319, 321; *Gila Valley Ry. Co.* v. *Hall*, 232 U. S. 94, 102, and cases cited.

When the employé does know of the defect, and appreciates the risk that is attributable to it, then if he continues in the employment, without objection, or without obtaining from the employer or his representative an assurance that the defect will be remedied, the employé

assumes the risk, even though it arise out of the master's breach of duty. If, however, there be a promise of reparation, then during such time as may be reasonably required for its performance or until the particular time specified for its performance, the employé relying upon the promise does not assume the risk unless at least the danger be so imminent that no ordinarily prudent man under the circumstances would rely upon such promise. *Hough* v. *Railway Co.*, 100 U. S. 213, 224; *Southwestern Brewery* v. *Schmidt*, 226 U. S. 162, 168. This branch of the law of master and servant seems to be traceable to *Holmes* v. *Clarke*, 6 Hurl. & Norm. 348; *Clarke* v. *Holmes*, 7 Hurl. & Norm. 937.

In the light of these principles, the rulings of the trial court in the case at bar must be considered.

Defendant specifically requested an instruction that plaintiff's right to recover damages was to be determined by the provisions of the Federal act, and that "If you find by a preponderance of evidence that the water glass on the engine on which plaintiff was employed was not provided with a guard glass, and the condition of the glass was open and obvious and was fully known to plaintiff, and he continued to use such water glass with such knowledge and without objection, and that he knew the risk incident thereto, then the court charges you that the plaintiff voluntarily assumed the risk incident to such use, and you will answer the second issue 'Yes.'" The court gave this instruction as applicable to the issue of contributory negligence, and instead of the words "then the court charges you that the plaintiff voluntarily assumed the risk incident to such use, and you will answer the second issue 'Yes,'" used the words, "then the court charges you that the plaintiff was guilty of contributory negligence, and you will answer the third issue 'Yes.'" To the refusal to give the instruction as requested, and the modification of it, defendant excepted.

The trial court evidently deemed, as did the state Supreme Court, that the topic of assumption of risk, with reference to the circumstances of the case, was sufficiently and properly covered by an instruction actually given as follows: after stating in general terms that "A man assumes the risk, when he takes employment, incident to the class of work which he has to perform," but that "He does not assume the risk incident to the negligence of his employer in providing machinery and appliances with which he has to work," the court proceeded as follows:

"On the other hand the employer has the right to assume that his employé will go about the work in a reasonably safe way, and give due regard to the machinery and appliances which are in his hands and under his control, and if you should find from the evidence, by its greater weight, because the burden in this instance is on the defendant, that the plaintiff knew of the absence of the guard or shield to the water gauge and failed to give notice to the defendant or to the agent whose duty it was to furnish the water gauge and appliance, and he continued to use it without giving that notice, *it being furnished to him in a safe condition*, then he assumed the risk incident to his work in the engine with the glass water gauge in that condition, although he might have handled his engine in every other respect with perfect care." [Italics ours.]

It will be observed that by this instruction the application of the rule of assumption of risk was conditioned upon the jury finding that the water gauge, when furnished to plaintiff, was in a safe condition. Here again the court appears to have followed the local statute, rather than the act of Congress; for § 2646, Nor. Car. Revisal of 1905, already quoted, has been held by the state Supreme Court to abolish assumption of risk as a bar to an action by a railroad employé for an injury attributable to defective appliances furnished by the employer. *Coley* v. *Railroad*

Co., 128 Nor. Car. 534. The trial court, while recognizing that the act of Congress applied so far as its terms extended, and that by its terms the employé is not to be held to have assumed the risk in any case where the violation by the carrier of a statute enacted for the safety of employés contributed to the injury, at the same time held that, since no statute had been enacted covering such an appliance as the glass water gauge, the rights of plaintiff were such as he would have under the state law. An instruction to the jury to this effect preceded the instructions we have just quoted.

It is true that such an appliance as the water gauge and guard glass in question is not covered by the provisions of the Safety Appliance Act, or any other law passed by Congress for the safety of employés, in force at the time this action arose. But the necessary result of this is, not to leave the employer responsible for the consequences of any defect in such an appliance, excluding the common law rule as to assumption of risk, but to leave the matter in this respect open to the ordinary application of the common law rule. The adoption of the opposite view would in effect leave the several state laws, and not the act of Congress, to control the subject-matter.

By the instruction as given, the application of the rule of assumed risk was confined to the single hypothesis that the jury should find the guard glass was in position when the engine was delivered to plaintiff on the morning of July 27. This, as already pointed out, was one of the questions in dispute; plaintiff having testified that the guard glass was missing at that time, while his fireman testified (and in this was corroborated by circumstantial evidence) that it was in place at that time, and was subsequently broken. But by the common law, with respect to the assumption by the employé of the risk of injuries attributable to defects due to the employer's negligence, when known and appreciated by the employé

and not made the subject of objection or complaint by him, it is quite immaterial whether the defect existed when the appliance was first placed in his charge, or subsequently arose. Hence, if the guard glass was missing when plaintiff first took the engine, as he testified, and he, knowing of its absence and the consequent risk to himself, continued to use the water gauge without giving notice of the defect to the defendant or its representative, he assumed the risk.

Defendant was entitled to have the requested instruction given respecting assumption of risk, and as the charge actually given did not cover the same ground, there was error.

Its harmful effect is conspicuously evident when we note that the jury, while finding that plaintiff did not assume the risk, at the same time found that he did by his own negligence contribute to his injury. Presumably, if instructed in the manner requested by defendant, the jury would have found that the risk was assumed, and this would have entitled defendant to a judgment in its favor, instead of a mere mitigation of the damages, which was the consequence of a finding of contributory negligence.

The judgment of the Supreme Court of North Carolina must be reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.